Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

PACE INDUSTRIES, INC. d/b/a PRECISION INDUSTRIES, INC.;
PACE INDUSTRIES, INC. d/b/a GENERAL PRECISION TOOL & DIE, INC.;
and PACE INDUSTRIES, INC. d/b/a AUTOMATIC CASTINGS, INC.,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER THE EIGHTH CIRCUIT ERRED IN ENFORCING A BARGAINING ORDER OF THE NLRB MORE THAN EIGHT YEARS AFTER THE OCCURRENCE OF THE INCIDENTS THAT GAVE RISE TO THE UNFAIR LABOR PRACTICE CHARGE, WHEN (a) 85% OF THE CURRENT WORK FORCE WAS NOT AFFECTED BY THE UNFAIR LABOR PRACTICE AND HAS NEVER VOTED TO BE REPRESENTED BY THE UNION, (b) THE DELAY WAS ATTRIBUTABLE TO THE NLRB, AND (c) THERE IS A SPLIT IN THE CIRCUITS AS TO WHETHER SUCH CHANGED CIRCUMSTANCES WILL PREVENT ENFORCEMENT.

List of Parent Companies and Non-Wholly-Owned Subsidiaries

1. All parties to the proceeding before the Eighth Circuit are listed in the caption of the case.

2. The parent company of Petitioner Pace Industries, Inc. ("PI"), is Leggett & Platt, Incorporated, a publicly held corporation. The only non-wholly owned subsidiary of PI, Pace Industries of Mexico, LLC, is 49% owned by Emerson Electric Co., a publicly held corporation.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Pace Industries, Inc., d/b/a Precision Industries, Inc.; Pace Industries, Inc., d/b/a General Precision Tool & Die, Inc.; and Pace Industries, Inc., d/b/a Automatic Castings, Inc. hereby request this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this case.

Opinions Below

The January 3, 1996, Decision and Order of the National Labor Relations Board is reported at 320 NLRB No. 15. It is reprinted in Appendix B beginning at page A-18.

The Opinion of the United States Court of Appeals for the Eighth Circuit filed on July 1, 1997, is published at 118 F.3d 585, and is reprinted in Appendix A at pages A-1 through A-17. By Order filed September 8, 1997, the Eighth Circuit denied the Petition for Rehearing and Suggestion for Rehearing En Banc (Appendix C, page A-207).

Jurisdictional Statement

The NLRB's jurisdiction was based on 29 U.S.C. §160. The jurisdiction of the Court of Appeals arose under 29 U.S.C. § 160(f). The Court of Appeals' Order denying Pace's Petition for Review and granting the NLRB's application for enforcement was entered on July 1, 1997. Pace's Petition for Rehearing and Suggestion for Rehearing En Banc were denied on September 8, 1997. This Petition was filed within 90 days of September 8.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

Statutes Involved

Pursuant to Supreme Court Rule 14(f), the pertinent text of the following statutes involved in this case is set out in Appendix D at pages A-208 through A-211:

Sections 1, 7, 8(a)(1), (3), and (5) and 9(a) and 9(c)(1)(b) of the National Labor Relations Act (the "Act"), 29 U.S.C. §§ 151, 157, 158(a)(1), (3), and (5) and 159(a) and 159(c)(1)(b).

Statement of the Case

In October 1988, Precision Industries ("PI") completed an asset purchase of Universal Die Casting's ("UDC") die casting plants located, respectively, in Malvern and Little Rock, Arkansas.[1/] At the time, there were approximately 35 active production and maintenance ("P&M") workers at UDC-Malvern, who were represented by the United Auto Workers ("UAW") (A-131). UDC ceased operations at Malvern and terminated all its employees (Tr. 454). All former UDC employees were invited to apply for PI jobs. More than 500 non-UDC applicants applied for the new advertised PI jobs (A-47, A-160; Tr. 179). PI's pre-employment selection criteria applied to all applicants. All UDC and non-UDC applicants who satisfied PI's pre-employment criteria were offered jobs.

PI's Malvern plant started operation in early November 1988 with 40 to 50 P&M employees, all of whom met the selection criteria. By May 1989, PI employed 84 workers, 22 of whom were former UDC P&M employees (A-47). PI hired several UAW officials, including the former UAW Local president. (Tr. 2237-38). On May 2, 1989, without any majority showing of interest (such as a petition or signed authorization cards), the UAW demanded recognition and bargaining with PI's Malvern facility (Tr. 388).

The UAW filed an NLRB charge on May 8, 1989, alleging violations of §§ 8(a)(1), (3) and (5) of the Act, specifically charging PI with a discriminatory failure to hire former UDC

[1/] In 1990, PI merged into Pace Industries and now operates as a Pace division. Initially, PI was a separate entity although Pace and PI shared some owners (Tr. 6206-07). PI and UDC shared no common ownership.

employees, and failure to recognize and bargain with the UAW. The NLRB Regional Director issued a Complaint on May 25, 1989.

The hearing on the unfair labor practice charge before the ALJ concluded in November 1991. The ALJ's decision was not filed until May 4, 1993, almost four years after issuance of the Complaint. The ALJ found against PI, as the successor to UDC-Malvern, on some of the original charges, and recommended comprehensive relief, including reinstatement offers and back pay for 62 former UDC employees and a requirement that PI bargain collectively with the Union (A-198).

The NLRB affirmed the recommended order with one partial dissent, notwithstanding a number of criticisms of the ALJ's analysis (A-18-A-28). The NLRB did not find that it was inherently unreasonable for PI to use the employment screening procedures. The NLRB did not find that any of the individual screening devices were disparately applied or unreasonable: "This . . . is not a typical case of antiunion discrimination, because it does not hinge on a finding of inherently unreasonable or disparate treatment" (A-23). The final Board decision was issued January 3, 1996, more than three and one-half years after the ALJ's decision, and nearly seven years after the charge was filed.

PI sought review in the Eighth Circuit, and the Board cross-petitioned for enforcement. On July 1, 1997, a three-judge panel of the Court of Appeals enforced the NLRB's order in its entirety. In so doing, the Court of Appeals failed to address whether the NLRB's bargaining order should be enforced in light of the changed circumstances, particularly the passage of

time and the changed composition of PI's work force, as argued by PI in its brief and at oral argument.[2/]

[2/] The Board sought to preclude the court's consideration of changed circumstances by contending that §10(e) of the NLRA, 29 U.S.C. §160(e), bars any argument not made before the Board. That section provides in part that "no objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." The inapplicability of §10(e) is apparent from its very language. First, it applies to objections addressed to Board rulings, and is not a limitation on the equity powers of the courts of appeals in determining the appropriateness of a particular remedy. Second, by definition "changed circumstances" occur subsequent to the Board's action and, like mootness or intervening death, could not have been presented before the Board. *See NLRB v. Children's Hospital of Michigan*, 6 F.3d 1147, 1154 (6th Cir. 1993) (where material evidence was not in existence at time of Board's hearings or rulings, remand is required). Third, the passage of more than eight years surely qualifies as an "extraordinary circumstance" within the meaning of §10(e). Fourth, in order to ensure that a bargaining order is issued "only in those exceptional circumstances that warrant it," the Board is "required to explain its need in each case, taking into account the employees' section 7 right to freedom of choice." *Charlotte Ampitheater Corp. v. NLRB*, 82 F.3d 1074, 1080 (D.C. Cir. 1996). Where, as here, the Board has not justified its order, enforcement is inappropriate. *Id.* Hence, §10(e) is not relevant to this case.

REASONS FOR GRANTING THE WRIT

THE EIGHTH CIRCUIT'S FAILURE TO CONSIDER WHETHER CHANGED CIRCUMSTANCES ARE RELEVANT TO THE ENFORCEMENT OF A BARGAINING ORDER IGNORES THE POLICIES UNDERLYING THE NLRA AND IS IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS.

When the UDC-Malvern plant closed in 1988, it had 35 union employees. At the time of the Eighth Circuit's opinion in July 1997, the PI plant in Malvern employed about 300 workers, the overwhelming majority of whom have never voted to organize and have never been represented by the UAW. Indeed, less than ten percent of the current work force consists of union members who were found by the Board to have been affected by the alleged unfair labor practices. Nevertheless, the Eighth Circuit, without even mentioning this dramatic shift in the landscape, ordered the company to recognize the union as the representative of these employees and to bargain collectively with the union. This order runs counter to the policies underlying the NLRA, is inconsistent with precedent in other Circuits, and should be reviewed by this Court.[3]

A bargaining order is an "extreme remedy." *Gardner Mech. Serv. v. NLRB*, 115 F.3d 636, 642 (9th Cir. 1997). The Fourth Circuit has recently observed that a bargaining order "is not a snake-oil cure for whatever ails the workplace; it is an extreme remedy that must be applied with commensurate care." *Be-Lo Stores v. NLRB*, 126 F.3d 268, 274 (4th Cir. 1997) (internal

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[3] Although the passage of time is evident from the Court's opinion, the court did not directly deal with petitioners' argument, based on changed circumstances, made in their brief (Pet. Br. 60-62) and at oral argument. The petition for rehearing also contained a vigorous argument directed to this issue, but it was denied without comment.

quotation marks omitted). The order in the present case was even more unusual and drastic because it was imposed on a successor employer.

In determining whether to enforce a bargaining order, an appellate court should consider circumstances existing at the time the order is to be carried out. Hence, courts have often refused to enforce bargaining orders by reason of events that have occurred subsequent to the commission of the unfair labor practice. *See e.g., Lee Lumber and Building Material v. NLRB*, 117 F.3d 1454 (D.C. Cir. 1997); *NLRB v. Cell Agricultural Mfg. Co.*, 41 F.3d 389 (8th Cir. 1994); *NLRB v. Thill, Inc.*, 980 F.2d 1137 (7th Cir. 1992); *NLRB v. LaVerdiere's Enterprises*, 933 F.2d 1045 (1st Cir. 1991); *M.P.C. Plating, Inc. v. NLRB*, 912 F.2d 883 (6th Cir. 1990).

The essential rationale underlying the "changed circumstances" doctrine is to avoid imposing an unwanted union on employees. *E.g., Thill*, 980 F.2d at 1142 ("The NLRA is concerned with protecting workers against unwanted unions as well as against union-busting"). Where, as here, there has been a substantial increase in the work force and very few of the current employees have ever opted for union representation, a bargaining order would impose a union upon them without allowing them the free choice mandated by federal labor law. An election, not a bargaining order, is therefore the appropriate remedy. *NLRB v. So-Lo Foods, Inc.*, 985 F.2d 123, 126 (4th Cir. 1993) ("an election, not a bargaining order, remains the traditional, as well as preferred method for determining the employees' bargaining agent").

In this and other recent cases, the changed circumstances were largely attributable to the protracted delay caused by NLRB inefficiency, indecisiveness, disorganization and/or perhaps other factors. Indeed, the Board's reputation for foot-dragging has caused Chief Judge Richard Posner of the Seventh Circuit to describe it as "The Rip Van Winkle of administrative agencies."

Thill, 980 F.3d at 1140. In *Thill*, the court noted a seven-year delay "while the Board sat on this case" and refused to enforce a bargaining order because the Board had failed to put forth persuasive reasons "why the passage of time had not destroyed the order's utility." *Id.* at 1143.

Other Circuits have likewise expressed frustration with the Board's inability to process cases in a timely fashion and its persistent refusal to acknowledge the difficulties that such delay creates, especially with regard to bargaining orders. For example, in *Cell Agricultural Mfg. Co.*, 41 F.3d at 398, the Eighth Circuit referred to the "running feud" between the Board and courts of appeals regarding whether changed circumstances, such as employee turnover or passage of time, are relevant to the decision to impose a bargaining order and chastised the Board for ignoring arguments that admittedly "have force" with the Courts of Appeals. In *Texas Petrochemical Corp. v. NLRB*, 923 F.2d 398, 404 (5th Cir. 1991), the court noted that the NLRB's decisional process took more than four years after the ALJ issued his determination and refused to enforce a bargaining order, saying that "... a four year delay by the Board is unreasonable . . . and cannot be ignored in developing a remedy that protects employee rights . . . . [U]nder all of the facts in this record, including the Board's lengthy delay, were we to enforce this bargaining order without ascertaining the employees' present desires, it would be tantamount to ignoring their statutory rights." *Id.* at 404, 406.

Likewise, in *LaVerdiers Enterprises*, 933 F.2d at 1054-55 (1st Cir. 1991), the court, noting a roughly six-year delay and employee turnover, refused to enforce a bargaining order, saying: "We share the view of other courts that inordinate delay attributable to the Board cannot be ignored in developing a remedy that protects employee rights." *See also Lee Lumber & Bldg. Material Corp.*, 117 F.3d at 1463 (D.C. Cir. 1997), Silberman, J., concurring ("Even I, however, one of only two

judges on this Circuit who have manifested toleration of the Board's policy...am dubious about a bargaining order in this case because it comes seven years after the crucial events and therefore seems quite stale. The delay, moreover, appears to be entirely the responsibility of the Board itself").

Besides the effect of inordinate delay, employee turnover sufficient to call into question the union's majority status has prevented the enforcement of bargaining orders. *See, e.g., NLRB v. Marion Rohr Corp.*, 714 F.2d 228, 231 (2d Cir. 1983) (order not enforced in light of 35% employee turnover); *Red Oaks Nursing Home v. NLRB*, 633 F.2d 503, 510 (7th Cir. 1980) (35%-65% turnover prevents enforcement). Here, more than 85% of the workers are new and have never voted or chosen to join the union or to work in a unionized workplace. A bargaining order violates their rights of self-determination and freedom of association. The Fourth Circuit's comments in *Be-Lo Stores* are instructive:

> "We have long held, contrary to the Board's view . . . that 'significant employee turnover through normal attrition' is highly relevant to determining the necessity of a bargaining order and well 'may make a bargaining order inappropriate' . . . and we reaffirm those decisions today. Significant employee turnover often (if not usually) renders a bargaining order inappropriate." *Be-Lo Stores*, 126 F.3d at 282 (internal citations omitted).

Other than the Court of Appeals in this case, the only Circuit that has refused to recognize the relevance of changed circumstances is the Ninth. In *NLRB v. Hanna Boys Center*, 940 F.2d 1295, 1299 (9th Cir. 1991), the court deplored the "egregious" six-year delay but "because we conclude that fewer policies are frustrated by enforcement than by nonenforcement, we choose the former." Likewise, in *NLRB v. Bakers of Paris*, 929 F.2d 1427 (9th Cir. 1991), the court refused to consider employee

turnover and the passage of time in evaluating the enforceability of a bargaining order.

In light of the NLRB's repeated refusals to acquiesce in Court of Appeals' decisions with which it disagrees, a definitive ruling by this Court on the important issue presented by this case will contribute to administrative and judicial economy, as well as providing guidance for judges, employers, unions and employees alike. A ruling by this Court will serve to protect the rights of employees who, like the workers in this case, were not involved in the underlying dispute and did not participate in the litigation and yet whose fate was dictated to them by the NLRB.

In view of the existing division of authority and continued Board delays in this and similar cases, this Court should grant review and require the Board and the courts to make sure that the extreme remedy of a bargaining order is issued and enforced only when necessary and appropriate to redress a then-current condition.

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

PACE INDUSTRIES, INC., doing business as Precision Industries, Inc.; Pace Industries, Inc.; Pace Industries, Inc., doing business as General Precision Tool & Die, Inc., Pace Industries, doing business as Automatic Castings, Inc., Petitioners,

V.

NATIONAL LABOR RELATIONS BOARD, Respondent.

PACE INDUSTRIES, INC., doing business as Precision Industries, Inc.; Pace Industries, Inc.; Pace Industries, Inc., doing business as General Precision Tool & Die, Inc., Pace Industries, doing business as Automatic Castings, Inc., Respondents,

V.

NATIONAL LABOR RELATIONS BOARD, Petitioner.

Nos. 96-1643, 96-1943.

United States Court of Appeals, Eighth Circuit.

Submitted Dec. 11, 1996.

Decided July 1, 1997.

Before WOLLMAN and MURPHY, Circuit Judges, and TUNHEIM[1] District Judge.

WOLLMAN, Circuit Judge.

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[1] The HONORABLE JOHN R. TUNHEIM, United States District Judge for the District of Minnesota, sitting by designation.

The National Labor Relations Board (Board) found that Precision Industries, Inc. (Precision)[2], violated sections 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act), 29 U.S.C. §§158(a)(1), (3), and (5). The Board found that Precision refused to hire employees formerly employed by its predecessor, Universal Die Casting, Inc. (Universal Die), because those employees were represented by the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) (the union); that Precision did so in order to avoid recognizing and bargaining with the union; and that Precision did in fact refuse to recognize and bargain with the union and unilaterally implemented changes in employment conditions. Precision petitions for review of the Board's decision and order, and the Board cross petitions for enforcement of its order. We deny the petition for review and grant enforcement of the order.

I.

Pace Industries, Inc. (Pace), is an aluminum die casting company located in Harrison, Arkansas, and owned by James Keenan and Bob Gaddy. In 1988, Keenan and Gaddy sought to expand their business and, along with another Pace officer, Jim Alford, formed Precision. In October of 1988, Precision agreed to purchase two plants owned by Universal Die, one located in Little Rock and the other in Malvern, Arkansas. Universal Die-Malvern was unionized, while Universal Die-Little Rock was not.[3] Gaddy testified that Precision was interested in Universal Die because Universal Die had been profitable, had a reputation for quality work, and would serve as a basis for future growth. At

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[2] At the time of the alleged violations, Precision was an entity separate from Pace Industries, Inc., although the two companies had some common owners. Precision has since merged into Pace and now operates as a division of Pace.

[3] Universal Die-Little Rock closed in 1989. None of the employees of that plant are alleged discriminatees in this proceeding.

about the same time as the Universal Die acquisition, Gaddy and Keenan, along with three others, also purchased two other non-union die casting companies in Alabama. In January of 1990, Gaddy and Keenan purchased an additional non-union die casting company.

During the week of October 10, 1988, Precision ran newspaper advertisements soliciting job applications from the general public for employment with Universal Die-Malvern. The employees at Universal Die-Malvern were informed that to secure continued employment they would have to submit applications. On October 14, 1988, Universal Die-Malvern ceased operations and discharged all of its employees. Universal Die-Malvern plant manager, Mike Nowak, continued in his position, as did the majority of all managerial and salaried employees. The Universal Die plant in Little Rock continued operations. Although its employees were required to complete an application, all but two or three of those employed before the purchase by Precision were rehired without any thorough review of the applications.

Precision implemented an elaborate hiring procedure at the Malvern plant, which cost between $75,000 and $100,000 to implement, caused an interruption in production, and resulted in a six to eight week hiring process, which Precision admitted jeopardized its commitments to its customers. Applicants were required to complete a nineteen-page application, which included an eight-page section requesting information such as the applicant's name, address, education, and work history. The application included a five-page medical questionnaire section, followed by a six-page short-answer essay section. Before former Universal Die employees' applications were considered, their personnel files were reviewed, with a notation being made concerning the employees' attendance records, disciplinary actions, and medical limitations.

Applicants who made it through the initial screening and review were then required to undergo a battery of verbal,

numerical, and dexterity tests. Dr. Mamdouh Bakr, an industrial engineer whose expertise was in retraining existing employees and not in hiring new employees, was hired to assist in this phase of the hiring process. Malvern plant manager Nowak and Precision's industrial engineer, David Watson, were also recruited to help in this phase of the process. Neither Nowak nor Watson appears to have had any experience in devising and applying tests designed to find suitable die casters.

Applicants who applied for tool and die and maintenance positions were subjected to the National Tool and Machine Association (NTMA) tests, which consisted of mechanical comprehension, verbal, mathematics, and problem-solving tests. Although the NTMA tests are not ordinarily given to maintenance employees, maintenance applicants were also given NTMA tests, as well as an applied electricity test. It is not clear who set the cut-off score for the NTMA tests or how that number was determined.

Other applicants were given Personnel Tests for Industry (PTI) and dexterity tests. The verbal part of the PTI consisted of fifty multiple-choice questions on defining words and identifying the non-relationship of words and phrases. The numerical test consisted of thirty mathematical problems in areas of basic addition, subtraction, division, and multiplication. The scores on these two tests were added together, and the passing score was apparently arbitrarily set at thirty. It appears, however, that the cut-off scores were not set until after Nowak and Watson had reviewed a number of the test scores. A five-point bonus was given to former Universal Die employees.

Dr. Bakr designed the dexterity tests, which purportedly tested for speed and accuracy. The tests included a "pegboard test," which consisted of inserting wooden dowels into holes; a "sorting card test," which entailed arranging cards according to the number of holes per card; and a "paint test," which required the applicant to put flat steel washers onto spokes and then

remove them. Watson, who admittedly had no testing expertise, was given the responsibility of establishing time limits and penalties for the dexterity tests.

New applicants who successfully completed these tests advanced to the next phase of the hiring procedure -- physical examinations and x-rays. Former Universal Die employee-applicants, however, were further reviewed before advancing to this phase. Even after passing the physical and x-ray examinations, the former Universal Die employees' personnel files were again reviewed in order to determine their medical limitations.

Although employees at non-unionized Universal Die-Little Rock were required to complete the application, they were subjected to neither the battery of tests nor the physical examinations. In addition, the plant manager for Universal Die-Little Rock, Roger Connor, had complete discretion in hiring and in fact rehired nearly all of the former employees at that plant. The employees of the three other non-union die casting companies acquired by Gaddy and Keenan were retained without having to complete applications and without having to undergo tests or physical examinations.

Connor and Little Rock sales associate, Debbie Key, questioned Precision officials about the differences in hiring procedures. Although Connor was initially told that the Malvern plant was not as busy as the Little Rock plant and had higher insurance costs, those reasons were never advanced during the investigation or at trial. Rather, Precision officials testified before the administrative law judge (ALJ) that the reason for the difference was the institution of new operating procedures. Connor testified that he asked whether the hiring procedures were an effort to keep out the union, and that his suspicions were later confirmed by Precision officials. Precision officials never denied Connor's accusations, but testified that they told Connor the union was not the reason. Connor and Key were later fired for alleged differences in business philosophies.

Of the 103 former Universal Die-Malvern employees that applied, only some twenty-two were ultimately rehired. Sixty-two of those that were rejected are alleged discriminatees in this action, which was brought by the union and charged Precision with engaging in unfair labor practices. The ALJ concluded that Precision refused to hire those sixty-two former Universal Die-Malvern employees because of their union affiliation and in order to avoid recognizing and bargaining with the union, in violation of sections 8(a)(1) and (3) of the Act. In addition, the ALJ found that Precision violated section 8(a)(5) of the Act by unilaterally changing the preexisting conditions of employment.

The ALJ's proposed remedy included a directive that Precision offer the discriminatees reinstatement, make them whole for any loss of earnings, recognize and bargain with the union, and rescind the unilateral changes that were implemented. The ALJ also recommended that Precision cease and desist from failing and refusing to hire former Universal Die-Malvern employees; from refusing to recognize and bargain with the union; from unilaterally setting and changing terms and conditions of bargaining unit employees; and from interfering with, restraining, or coercing employees in the exercise of their rights under section 7 of the Act, which includes the right to organize, join, form, or assist any union. The Board affirmed the ALJ's rulings, findings, and conclusions, subject to some modifications, and adopted the recommended order.[4]

II.

Precision's first argument is that res judicata bars enforcement of the Board's order. Precision argues that the claims now before

[4] The Board rejected the ALJ's statement that he was compelled to find a violation of the Act because he found Precision's witnesses not to be credible. The Board pointed out that if an ALJ discredits testimony, the ALJ may infer that reasons other than those proffered were the motivation behind the hiring procedures, but is not required to do so. The Board, however, affirmed the ALJ, agreeing that anti-union animus was shown through direct evidence as well.

the court could have been brought in an earlier lawsuit that the union filed in district court under section 301 of the Act, which alleged that Precision had breached the purchase agreement by refusing to pay plan provided health and life insurance benefits established in the collective bargaining agreement (CBA), thereby violating the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §1001 et. seq. The district court found that Precision had not agreed to assume the insurance benefits program and dismissed the action.

"Under the doctrine of res judicata, a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action." *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 326 n. 5, 99 S.Ct 645, 649 n. 5, 58 L.Ed.2d 552 (1979). Although res judicata bars not only relitigation of claims that a party raised, but also claims the party could have raised in the prior adjudication, see *Allen v. McCurry*, 449 U.S. 90, 94, 101 S.Ct. 411, 414-15, 66 L.Ed.2d 308 (1980), Precision's assertion that the unfair labor practices claim could have been brought in the earlier proceeding is without merit.

The allegation of unfair labor practice is not a claim that could have been raised in the earlier proceeding, for an allegation of unfair labor practices brought pursuant to 29 U.S.C. §158 of the Act is a claim within the exclusive jurisdiction of the Board. *See Sears, Roebuck and Co. v. Solien*, 450 F.2d 353, 355 (8th Cir.1971) ("It has long been settled that jurisdiction to prevent persons from engaging in unfair labor practices is exclusively vested in the Board and courts of appeals."). Precision argues, however, that although the district court has no jurisdiction to hear a claim of unfair labor practices, the union could have styled its claim of unfair labor practices as a breach of the CBA, which the district court would have had jurisdiction to hear pursuant to 29 U.S.C. §185. Precision's reasoning is flawed, for "[W]hen an activity is arguably subject to §7 or §8 of the Act, the States as

well as the federal courts *must* defer to the exclusive competence of the National Labor Relations Board...." *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 245, 79 S.Ct. 773, 780, 3 L.Ed.2d 775 (1959) (emphasis added). The unfair labor practices alleged in this claim are more than just "arguably" subject to section 8 of the Act; they fall squarely within its purview, and the district court would have been required to defer to the Board for adjudication of those alleged violations.

III.

Precision contends that substantial evidence does not support the Board's finding of unfair labor practices. As a successor employer, Precision is generally free to set its own terms and conditions of employment. Because Precision has continued the predecessor's business in substantially the same form, however, Precision is obligated to bargain with the union if a majority of Precision's work force were also the predecessor's employees. *See U.S. Marine Corp. v. NLRB*, 944 F.2d 1305, 1315 (7th Cir.1991) (citing *Fall River Dyeing and Finishing Corp. v. NLRB*, 482 U.S. 27, 47, 107 S.Ct. 2225, 2238, 96 L.Ed.2d 22 (1987)). Discriminatory hiring decisions and a refusal to employ former employees in order to avoid bargaining obligation constitute a violation of section 8(a)(3) of the Act. *Id.* The question, then, is whether the hiring procedures reflected an attempt by Precision to avoid its bargaining obligation.

Even though an employer may have legitimate justifications for its actions, such actions may still constitute unfair labor practices if anti-union animus was also a motivating factor.[5] In cases where mixed or dual motives exist, we apply the test set

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[5] The ALJ alternatively found, and the Board agreed, that general counsel had established that Precision's sole motivation in implementing the hiring practices was to discriminate against employees based on their union affiliation. In light of our conclusion that substantial evidence supports a finding of mixed motives, we do not address this issue

forth in *Wright Line*, 251 N.L.R.B. 1083, 1980 WL 12312 (1980), to determine whether the employer has engaged in unfair labor practices:

> First, we shall require that the General Counsel make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

Id. at 1089 (footnote omitted). The Board may infer unlawful motivation from direct and circumstantial evidence and is "'permitted to draw reasonable inferences, and to choose between fairly conflicting views of the evidence.'" *Concepts and Designs, Inc. v. NLRB*, 101 F.3d 1243, 1245 (8th Cir.1996) (citations omitted).

We afford "great deference to the Board's affirmation of the ALJ's findings." *Town and Country Elec., Inc. v. NLRB*, 106 F.3d 816, 819 (8th Cir. 1997). The Board's order will be enforced "if the Board has correctly applied the law and its factual findings are supported by substantial evidence on the record as a whole, even if we might have reached a different decision had the matter been before us de novo." *Id.* Although in the past we have applied a "shock the conscience" standard of review to an ALJ's credibility determinations, we have recently indicated a preference for considering credibility determinations "with the rest of the NLRB's factual findings under the general substantial evidence test derived from *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951)." *Id.* We conclude that the record reveals that the Board's findings and its credibility determinations are supported by substantial evidence.

A. Substantial evidence supports the Board's credibility determinations.

The ALJ conducted an exhaustive analysis of the testimony and made detailed findings as to the credibility of the witnesses, as evidenced by his fifty-two page opinion. In crediting Connor's and Key's testimony, the ALJ found that while there were some variations in their accounts of the events that took place, these inconsistencies were minor and did not relate to the substance of their allegations. Other evidence tending to detract from Connor's and Key's credibility was likewise insubstantial and was refuted by evidence to the contrary. For instance, although there was testimony that Connor was bitter about being fired and that he wished to "get back at" Precision, that evidence was offset by the fact that Connor first raised the issue of the discrepancy in hiring procedures sometime in October of 1988, which was prior to his March 1989 termination. Connor's willingness to cooperate in helping with Precision's customers even after his termination further refutes the assertion that his accusations were motivated by revenge. The ALJ remarked that during their testimony neither Connor nor Key appeared to harbor animosity or bitterness toward Precision. Furthermore, Connor's credibility and the veracity of his allegations are bolstered by the fact that even after Connor questioned Precision about its motives in implementing the hiring procedures, he was made vice president of Precision and given a pay raise.

We also conclude that sufficient evidence exists to affirm the ALJ's decision to discredit the testimony of Alford, Gaddy, and Nowak. These witnesses' accounts of events are not only self-contradictory, but at times also contradict each other. In addition, even after the decision had been made to close the Little Rock facility, Alford and Gaddy admittedly lied to Connor about the possibility of the Little Rock plant remaining open.

B. Substantial evidence supports the Board's finding that anti-union animus was a motivating factor behind Precision's hiring decisions.

We also conclude that substantial evidence supports the Board's finding that anti-union animus was a motivating factor in Precision's implementation of the hiring procedure.

Alford testified that Precision officials learned in August or September of 1988 that if it hired more than fifty percent of Universal Die's work force, it would have to bargain with the union. It was during this time period that Precision decided to implement the hiring procedure.

As indicated earlier, when first questioned by Connor about the differences in hiring procedures, Alford gave as a reason the fact that the Malvern plant was not as busy as the Little Rock plant and that higher insurance costs mandated the physical examinations at Malvern. This explanation, however, was never asserted during the investigation or at trial. Connor testified that the next time he questioned Alford about the reason for the different procedures, Connor remarked that it was to get rid of the union. Connor testified that Alford never denied the statement, but instead told Connor to never say that. Connor testified that three or four subsequent conversations about the hiring procedures at Malvern revealed that it was an attempt by Precision to keep its new work force to less than fifty percent former Universal Die employees so as to avoid having to bargain with the union. Precision's witnesses never explicitly denied making remarks about getting rid of the union, testifying only that they "didn't remember" or were "not aware" of those statements.

Connor also testified to conversations with Nowak in which they discussed the fifty percent ratio. Connor stated that he and Nowak frequently discussed the progress of the hiring procedure and specifically the number of former Universal Die employees that had been hired up to that point. Connor recalled that about

a month after Precision had purchased Universal Die, Nowak told him that things looked good because only seventeen of the forty-three employees hired were former Universal Die employees. Connor also stated that Nowak told him that the less Connor knew, the better, because they would ultimately end up going to court.

Connor also testified about a meeting with Nowak and Universal Die's former owner, Lou Zachery. Connor testified that he heard Zachery say that union representation was costly and caused many headaches and that he had made a mistake in not getting rid of the union at Malvern. When questioned about these remarks, Nowak did not contradict them, but merely stated that Precision's relationship with the union was good.

Anti-union motivation is also evident from the reasons why many of the alleged discriminatees were not hired. Eight of the alleged discriminatees were rejected because they had entered too high a wage rate on their applications. Several of these, however, also indicated that they would accept a reasonable or compatible rate. Three were not hired because their medical information was incomplete; however, all three had been Universal Die employees for the previous eleven years and all of the requested information was contained in their personnel files. One applicant was rejected because he failed to list his industry experience; he had been an employee with Universal Die for twenty-three years and had indicated that he had a total of forty years' maintenance experience. The ALJ noted that six non-Universal Die applicants had been hired despite similar omissions in their applications. An additional seven former Universal Die employees were rejected because of medical limitations. Some of the purported limitations were unrelated to positions for which the applicants applied, however, and some of these applicants were rejected despite their past demonstrated ability to perform the job. Eight non-Universal Die employees were hired even though they had attained test scores for which

Universal Die applicants were eliminated. Eight Universal Die applicants were rejected because they failed the back x-ray, even though they were actively employed before the October 14 closing. Two union officers that passed the tests were never notified to take the physical exams and thus were not considered for employment.

Viewing the record as a whole, then, we conclude that substantial evidence exists to support the ALJ's finding of anti-union animus, and the first element of the *Wright Line* test has therefore been satisfied.

C. Precision has not met its burden of showing that it would have taken the same action absent its anti-union animus.

Gaddy and Alford testified that the hiring procedure was implemented in large part because of Precision's desire to implement statistical process control (SPC), a process which relies less on inspections at the end of the production process and more on the involvement of the workers to detect problems during production and at the earliest possible stage. The ALJ discredited that testimony not only because of Gaddy's and Alford's pecuniary motives and contradictory testimony; but also because they admittedly never advanced that reason during the entire investigation. Moreover, Alford never stated that SPC was the reason in his affidavit to the Board, either initially or when given the chance to review his affidavit and make additions or deletions. The ALJ also pointed out that although SPC-capability was allegedly such an overriding concern, neither Gaddy nor Alford questioned anyone about SPC-capability prior to purchasing Universal Die. Moreover, the assertion that an entire new work force was needed in order to implement SPC is refuted by Gaddy's and Alford's testimony that Universal Die was purchased because they thought it was SPC-capable. Furthermore, other evidence indicated that an SPC program was already to some extent in place at Universal Die-Malvern.

Precision also claims that its change in operations from mostly proprietary work to all custom work warranted the hiring of a new work force and created the need for the hiring procedures used. Nowak's testimony, however, reveals that he was given instructions to devise a hiring procedure in September of 1988, which according to the ALJ's findings was well in advance of any discussions that Nowak had about Universal Die employees' new job functions. Another fact that belies the assertion that custom work warranted the new work force is that, according to Precision's own witnesses, the only difference between custom and proprietary work is ownership of the dies -- the die is owned by the customer in custom work, while Precision owns the dies for proprietary work. In addition, Alford admitted that the same basic jobs that were done at Malvern before the sale continued to be performed there even after the sale to Precision. Those facts, along with the facts that Malvern was already doing some custom work and Little Rock was doing all custom work, refute Precision's assertion that a new work force was mandated by the change in operations.

The alleged need for the physical and x-ray examinations is contradicted by the fact that the new castings that were to be made at Precision were only a few pounds heavier than the previous castings and that many of them were very light, weighing only one to three pounds.

Alford stated that the reason for the testing and examinations was that with the changes planned at Universal Die-Malvern, the work and equipment would be more sophisticated and the required engineering and intellectual capacity of the workers would be greater. Alford admitted, however, that the work at the Alabama plants, which were both non-union, involved greater degrees of sophistication and engineering, yet no testing of any sort was done there. Maintenance applicants were required to take the NTMA tests despite the fact that those tests are not recommended for testing in that position. The NTMA tests were

appropriate to test machinists and tool and die makers, yet the NTMA tests were not given to such employees at the non-unionized Alabama plants, where manufacturing and major repairing of dies was done.

The dexterity tests were devised by Bakr, Nowak, and Watson, none of whom had experience in developing and applying tests for hiring employees for die casting positions. There was no evidence to show that Bakr was instructed by Alford or Gaddy to design tests that would specifically identify SPC qualities, and the tests were not shown to test for abilities relating to fractions of either SPC or non-SPC die casting. The passing scores for the tests were likewise arbitrary and were established only after more than 200 of the tests had been reviewed.

Significantly, although Watson admitted that experience was, overall, the best indicator of job performance, experience was in no way factored into the screening process.

We conclude that substantial evidence supports the Board's finding that the proffered reasons for implementing the hiring procedure were largely pretextual and that Precision did not sustain its burden of showing that it would have taken the same action even absent the unlawful motivation.

IV.

Precision contends that the Board's remedy exceeds its authority. In reviewing this claim, we keep in mind that the Board has "primary responsibility and broad discretion to devise remedies that effectuate the policies of the Act, subject only to limited judicial review." *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 898-99, 104 S.Ct. 2803, 2812, 81 L.Ed.2d 732 (1984). The "Board draws on a fund of knowledge and expertise all its own, and its choice of remedy must therefore be given special respect by reviewing courts." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 612 n. 32, 89 S.Ct. 1918, 1939 n. 32, 23 L.Ed.2d 547 (1969). The remedy will be enforced "unless it can be shown that the

order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 540, 63 S.Ct. 1214, 1218, 87 L.Ed. 1568 (1943); *Packing House and Indus. Servs., Inc. v. NLRB*, 590 F.2d 688, 697 (8th Cir. 1978).

Ordering Precision to offer reinstatement and back pay is plainly within the Board's power, as it comports with the plain language of the Act. Section 10(c) of the Act provides that the Board may order that a violator "cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies [of the Act]." 29 U.S.C. §160(c).

The order likewise comports with the policies underlying the Act. The goal of a remedial order is to restore "the situation, as nearly as possible, to that which would have obtained but for the [unfair labor practices]." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194, 61 S.Ct. 845, 854, 85 L.Ed. 1271 (1940). Ordering Precision to offer reinstatement and backpay to the discriminatees is directly aimed at and fulfills that purpose. *See Packing Home and Indus. Serv., Inc.*, 590 F.2d at 697. ("An order requiring reinstatement and backpay is aimed at 'restoring the economic status quo that would have obtained but for the company's [wrongdoing].'") (citation omitted); *see also Sure-Tan, Inc. v. NLRB*, 467 U.S. at 900, 104 S.Ct. at 2813 ("the general legitimacy of the backpay order as a means to restore the situation 'as nearly as possible, to that which would have obtained but for the illegal discrimination,' is by now beyond dispute." (citation omitted)).

Rescinding the unilateral changes in employment conditions likewise comports with the polices of the Act. In fashioning the order, the ALJ correctly presumed that without the discriminatory hiring practices the union's majority status would have continued, which in turn would have required that Precision bargain with the union before making changes in employment

terms. *See U.S. Marine Corp.*, 944 F.2d at 1322. The Board's remedy

> is based on the established principles applicable to successors who discriminate in order to avoid a bargaining obligation; such employers lose the right to set initial terms and conditions of employment and may be ordered to rescind any changes in those terms and compensate employees for losses in order to put them in the position they would have been but for the employer's unlawful conduct.

Id. at 1323.

We have reviewed the remainder of the Board's remedy and conclude that it does not transgress the authority conferred upon the Board by the Act.

The petition for review is denied. The Board's order is enforced in its entirety.

APPENDIX B

NOTICE: This opinion is subject to formal revision before publication in the Board Volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Pace Industries, Inc., d/b/a Precision Industries, Inc., Pace Industries, Inc., Pace Industries, Inc., d/b/a General Precision Tool & Die, Inc., Pace Industries, Inc., d/b/a Automatic Castings, Inc., a single employer *and* International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) Case 26-CA-13117

January 3, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS COHEN AND TRUESDALE

On May 4, 1993, Administrative Law Judge Thomas R. Wilks issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and the Charging Party filed answering briefs, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs[1] and has decided to affirm the

[1] The Respondent has requested oral argument. The request is denied as the record, the exceptions, and the briefs adequately present the issues and positions of the parties.

judge's rulings,[2] findings,[3] and conclusions as modified herein and to adopt the recommended Order.

1. We adopt the judge's finding that the Respondent adopted a combination of preemployment screening, testing, physical examinations, and back X-rays at its Malvern, Arkansas facility solely to keep from hiring a majority of its work force at that plant from among the former employees of its unionized predecessor, Universal Die Casting, Inc. (UDC), and thus to avoid having to recognize and bargain with the Union. We also adopt his corollary finding that the Respondent's proffered reasons for following those procedures were false and pretextual.

In affirming the judge's findings, however, we disavow his implication that, disregarding other evidence of unlawful moti-

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[2] The Respondent has excepted to the judge's ruling excluding from evidence certain parts it produces, and has moved to introduce those parts into the record. We find no merit to that exception, and we deny the motion, because the introduction of the parts would not affect our conclusions.

[3] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. In this regard, we find no merit to the Respondent's contention that the judge's credibility findings are undermined by his consistent crediting of the General Counsel's witnesses over those of the Respondent. The total rejection of one party's witnesses does not of itself constitute a basis for overturning a judge's credibility determinations. *NLRB v. Pittsburgh Steamship Co.*, 337 U.S. 656, 659 (1949).

We delete the inadvertent reference to a violation of Sec. 8(a)(2) from the remedy section of the judge's decision. We also correct the judge's citations to *Radio Union Local 1264 v. Broadcast Service*, 380 U.S. 255 (1965), *NLRB v. Burns International Security Services*, 406 U.S. 272 (1972), *Systems Management*, 292 NLRB 1075 (1989), and *Howard Johnson Co.*, 209 NLRB 1122 (1974).

vation, he was constrained to find a violation of Section 8(a)(3) solely because he did not believe the testimony of the Respondent's witnesses concerning the reasons for implementing the screening processes at Malvern. Having discredited the Respondent's explanations for its actions, the judge was entitled to infer that there was another reason, but it does not necessarily follow that the real reason was grounded in antiunion animus. Those explanations might have been offered in an attempt to conceal a violation of some other statute instead of the Act, or a motive that may have been base but not unlawful at all.[4] Consequently, we reject any suggestion that the "inconsistencies, contradictions, improbabilities and aberrational and shifting explanations"[5] in the testimony of the Respondent's witnesses "necessarily compel" the conclusion that the Respondent's true motive in implementing those processes was discriminatory within the meaning of the Act.

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[4] *See Marrion Corp.*, 251 NLRB 1355, 1360 (1980). *See also St. Mary's Honor Center v. Hicks*, 113 S.Ct. 2742 (1993) (In Title VII case, trier of fact's rejection of defendant's proffered reasons *permits*, but does not *compel*, finding of intentional discrimination).

Shattuck Denn Mining Corp. v. NLRB, 362 F.2d 466 (9th Cir. 1966), and *Williams Contracting*, 309 NLRB 433 (1992), which the judge cited, do not support his thesis. Both the court in *Shattuck Denn* and the Board in *Williams* inferred unlawful motive from explanations found to be pretextual, but not from the pretextual explanations alone; other evidence of unlawful motive existed as well. And both the court and the Board found that the inference of unlawful discrimination was *permissible*, not *compelled*.

[5] The Respondent argues that it was improper for the judge to infer unlawful motive from its witnesses' shifting explanations. We find no merit to that argument. When a party's story keeps changing, it is perfectly appropriate for the finder of fact to conclude that none of the various versions are true. *Doug Hartley, Inc. v. NLRB*, 669 F.2d 579 (9th Cir. 1982), cited by the Respondent, is not to the contrary. Unlike this case, in which the judge found the Respondent's witnesses' testimony inconsistent and contradictory, the court in *Doug Hartley* found that the employer's multiple explanations were consistent.

We nonetheless affirm the judge, because he found in the alternative that the General Counsel had proved by direct evidence that the Respondent's sole motive was unlawful. Thus, the judge found, on the basis of the credited testimony of Roger Connor and Debbie Key, that the Respondent had admitted adopting the employment screening procedures at Malvern in order to avoid union representation.[6] That evidence, considered in the context of what he found to be dissembling by the Respondent's witnesses, led the judge to conclude that the Respondent's proffered business reasons were totally false and pretextual, and that the General Counsel had proved by a preponderance of the evidence that the Respondent's only real motive was unlawful. That was a permissible finding, well grounded in the record, and we affirm it.

We further adopt the judge's finding that, even if the Respondent actually had mixed motives for its actions -- that is, even if it had lawful business-related motives as well as the unlawful motive demonstrated by the General Counsel[7] -- it failed to prove

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[6] This case thus is distinguishable from numerous decisions cited by the Respondent, in which the Board declined to infer that employers acted out of antiunion motivation. Here, according to the credited testimony, unlawful motive was admitted by the Respondent's agents at the time.

[7] *See Wright Line*, 251 NLRB 1083 (1980). The Respondent contends that the General Counsel failed to establish a prima facie case that the hiring procedures at Malvern were implemented for unlawful reasons. We find no merit to that contention. The Respondent's unlawful motive was established by direct evidence. Moreover, contrary to the Respondent, the judge did not require it to prove, in the prima facie stage of analysis, that it had a sufficient business justification for its actions. Nor did he require the Respondent to disprove the existence of antiunion animus. The judge properly considered all the relevant record evidence, including the Respondent's witnesses' discredited testimony, in finding that the General Counsel had proved that the Respondent acted from unlawful motives. *See Greco & Haines, Inc.*, 306 NLRB 634 (1992); *Union-Tribune Publishing Co. v. NLRB*, 1 F.3d 486 (7th

(Footnote 7 continued on next page)

that it would have taken the same actions in the absence of the unlawful motive.[8] In this regard, however, we do not rely on his finding that the Respondent failed to prove that the procedures it adopted at Malvern *in fact* identified the best workers or workers with specific skills. Even if the procedures actually failed in that respect, the Respondent might have believed, ex ante, that they would succeed. In those circumstances, it would be inappropriate to infer from their actual failure that the Respondent would not have implemented them had it not been for

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(Footnote 7 continued)

Cir. 1993); *Wright Line*, *supra*, 251 NLRB at 1088 fn. 12; *Shattuck Denn Mining Co. v. NLRB*, *supra*, 362 F.2d at 470. That the judge must consider the General Counsel's prima facie case separately from the Respondent's *Wright Line* defense, see *Cine Enterprises*, 301 NLRB 446, 447 (1991), means only that the judge need not address the Respondent's defense at all unless he first finds that the General Counsel has proved that the Respondent acted, at least in part, from unlawful motives. It does not mean that the judge, in determining whether the General Counsel has carried his prima facie burden, may not consider evidence that also bears on the Respondent's defense.

[8] *See Wright Line*, *supra*. In this regard, we find no merit to the Respondent's argument that *Wright Line* should not apply in cases involving refusals to hire in the successorship context. The Board in *Wright Line* explicitly stated that the analysis announced therein would be applied in *all* Sec. 8(a)(3) cases, 251 NLRB at 1089, and it has applied *Wright Line* analysis in cases involving refusals to hire by putative successors. *See, e.g., Laro Maintenance Corp.*, 312 NLRB 155, 162-163 (1993), enfd. 56 F.3d 224 (D.C. Cir. 1995); *Wilson Tree Co.*, 312 NLRB 883, 884-885 (1993). The dictum in fn. 5 of *Burns*, *supra*, on which the Respondent relies, is not to the contrary. It states simply that an employer violates Sec. 8(a)(3) by refusing to hire employees solely because they are union members; it does not suggest that the refusal to hire is unlawful *only* if it is *solely* based on union membership. In any event, we agree with the judge's finding that the Respondent's failure to hire the discriminatees was based entirely on antiunion considerations.

We further find no merit to the Respondent's argument that the judge confused "mixed-motive" cases with "pretext" cases (those in which only one, unlawful, motive is found). The judge separately analyzed the evidence under both theories and found that, under either theory, a violation had been established.

the employees' union activities.[9] Nor do we rely on the judge's finding that the Respondent required applicants to undergo physical ability screening, physical examinations, and back X-rays in the absence of actual, known physical disabilities. It is entirely plausible that an employer with no discriminatory motive under our statute would wish to avoid hiring individuals who were prone to workplace injury because of physical problems, and would seek to identify such individuals in advance by means of tests or X-rays. That such conditions might be undisclosed or even unknown to the individual at the time of application is beside the point.

Finally, in adopting the judge's finding that the Respondent violated Section 8(a)(3), we stress that neither we nor the judge have found that it was inherently unreasonable for the Respondent to use employment screening procedures such as application forms, aptitude testing, or physical examinations, or to make employment decisions on the basis of information gleaned from those procedures. Nor have we found that any of the individual screening devices were unreasonable. And we have not found it necessary to determine whether the Respondent engaged in disparate treatment of former employees of UDC by systematically applying the procedures more stringently to them than to other applicants, or whether it passed over qualified former UDC employees in order to hire other, less qualified applicants.

This, in other words, is not a typical case of antiunion discrimination, because it does not hinge on a finding of inherently unreasonable or disparate treatment. Such treatment was unnec-

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[9] The judge's finding that the screening procedures were not specifically designed or constructed to identify the particular traits the Respondent allegedly was seeking is another matter. Such evidence, in our view, reduces the likelihood that the procedures were *expected* to achieve the results for which they assertedly were implemented, and was properly considered by the judge in arriving at his finding that the Respondent had not carried its *Wright Line* burden.

essary for the Respondent's purpose, which was not to deny employment to all applicants who were union members, but simply to make sure that former UDC employees did not make up a majority of its work force, and thereby to avoid incurring the duty to recognize and bargain with the Union. For that purpose the Respondent did not need to adopt unreasonable hiring criteria or to apply reasonable criteria unequally. It had only to adopt and apply *a* set of screening devices -- any set would do -- provided that the acceptable level of performance was fixed high enough to exclude the requisite number of former UDC employees. As the judge found, that is what the Respondent did, and that is why he, and we, have found the violation.[10]

2. In its exceptions, the Respondent argues that the complaint should be dismissed entirely on the ground of res judicata. It further argues that, as to a few of the discriminatees, the complaint is barred by judicial estoppel. We find no merit to either contention.

The Respondent bases its res judicata argument on its having prevailed in an ERISA suit brought by the Union and certain former UDC employees and retirees.[11] The plaintiffs alleged that

[10] In its exceptions, the Respondent continues to argue that its screening processes were reasonable and evenhandedly applied, and that the judge erred in failing to consider other record evidence to that effect. We find no merit to those arguments. As we have discussed in text above, the issue here is not whether the screening criteria were reasonable or evenhandedly applied; the issue is whether they would have been adopted at all except for the employees' union activities.

The Respondent also contends that the judge substituted his business judgment for that of the Respondent, and that he presumed that former UDC employees should have been hired en masse or that the Respondent should have given them preference in hiring. We find nothing in the judge's decision to support any of those contentions.

[11] *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), et al. v. Universal Die Casting, Inc., et al.*, Civil Nos. 90-6037, 89-6071 (W.D. Ark).

the Respondent, under the terms of the purchase agreement with UDC, had agreed to assume responsibility for a health and life insurance benefit plan that had been established under UDC's collective-bargaining agreement with the Union, but thereafter had failed to provide the agreed-on benefits and terminated the plan. The district court found that the Respondent had not agreed to assume the insurance benefit programs, and dismissed the suit.

Even assuming, arguendo, that principles of res judicata would otherwise be applicable in this case, we find that the court's decision does not preclude the General Counsel from litigating the issues before us. First, the General Counsel was not a party to the court action. The Board adheres to the general rule that the Government is not precluded from litigating an issue involving the enforcement of Federal law that a private party has litigated unsuccessfully, when the Government was not a party to the private litigation.[12] Second, the issues decided in the district court action were not those before us in this proceeding. The court was faced only with a claim that the Respondent had incurred a contractual duty to provide certain benefits and that the duty had been breached. It was not confronted with the issues here -- of discriminatory hiring, successorship, and the Respondent's statutory obligation not to change terms and conditions of employment (contract or no contract) without first affording the Union an opportunity to bargain.[13] Accordingly,

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[12] *Field Bridge Associates*, 306 NLRB 322 (1992), enfd. sub nom. *Service Employees v. NLRB*, 982 F.2d 845 (2d Cir. 1993).

[13] *See Service Employees v. NLRB, supra*, 982 F.2d at 849; *NLRB v. Donna-Lee Sportswear Co.*, 836 F.2d 31 (1st Cir. 1987), and *NLRB v. Heyman*, 541 F.2d 796 (9th Cir. 1976), cited by the Respondent, are distinguishable from this case. In both of those cases, the issue in the unfair labor practice case -- the existence, vel non, of a contract -- was the same as the one that had been decided in the court proceeding.

the Respondent's res judicata argument is without merit.[14]

Likewise, we reject the Respondent's contention that judicial estoppel applies here. The gist of the doctrine of judicial estoppel is that a party who has successfully asserted one position in a legal proceeding should not be permitted thereafter to assert a clearly inconsistent position in the same or related proceedings.[15] In this case, several of the discriminatees filed charges with the EEOC alleging that the Respondent's failure to hire them was based on their race or age. The Respondent contends that the General Counsel may not now contend that the failure to hire those individuals was based instead on antiunion animus. That argument is clearly without merit, again assuming arguendo that this doctrine is applicable to proceedings before the Board. Neither the General Counsel nor the Union (the Charging Party) filed the EEOC charges; certainly they have not taken inconsistent positions here. Nor are the individuals who filed the Title VII charges parties in this proceeding. In any event, we see nothing inconsistent in alleging race or age discrimination in one forum and discrimination based on union membership in another. The individuals in question may have believed in good faith that the Respondent had more than one

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[14] The Respondent's alternative argument that the Board is collaterally estopped by the court's decision from ordering restoration of the benefit plans similarly fails because the issues, again, are different here from those decided by the court. A restoration remedy will not be for a contract violation because it will not be based on the continued enforceability of the expired contract. It will, instead, restore the terms and conditions of employment that existed before they were altered by the Respondent without bargaining with the Union, in violation of the Act.

[15] See, e.g., *Matter of Cassidy*, 892 F.2d 637, 641 (7th Cir. 1990).

illegal motive for declining to hire them.[16] For these reasons, we find that judicial estoppel does not bar the claims on behalf of those discriminatees.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Pace Industries, Inc., d/b/a Precision Industries, Inc., Pace Industries, Inc., Pace Industries, Inc., d/b/a General Precision Tool & Die, Inc., Pace Industries, Inc., d/b/a Automatic Castings, Inc., a single employer, Malvern, Arkansas, its officers, agents, successors, and assigns, shall take the action set forth in the Order.[17]

Dated, Washington, D.C. January 3, 1996

William B. Gould IV, Chairman

John C. Truesdale, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

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[16] Id. at 642 (judicial estoppel should not be used when there is only the appearance of inconsistency between two positions that may actually be reconcilable).

[17] In its exceptions, the Respondent contends that the remedy should not be extended to "medical discriminatees" who would not have been employed because of physical infirmities. We reject that argument, which is based on the premise that it is permissible to exclude an individual from employment on the basis of unlawfully adopted hiring standards. Should the Respondent demonstrate at compliance that it has implemented hiring standards that are not based on discriminatory motives, we shall not require it to reinstate any discriminatee who fails to meet those standards, or to make whole any discriminatee for any period in which the individual did not meet the standards once they were in effect.

MEMBER COHEN, dissenting in part.

I agree with my colleagues except in the following respect. I do not agree that the Respondent was obligated to bargain with the Union regarding initial terms and conditions of employment. In my view, a successor is so obligated if (1) but for its discriminatory practices it would have hired its entire complement from the predecessor's employees; and (2) it fails to announce to the predecessor's employees, prior to, or simultaneously with, extending an unconditional offer of hire, that its initial terms will be different from the predecessor's terms.[1]

Here, as to the first part of my test, I assume arguendo that, absent the Respondent's discrimination, it would have hired its entire complement from the predecessor's employees. As to the second part of my test, however, I find that the Respondent announced, prior to hiring employees, that its wage rate would differ from that of the predecessor. Accordingly, the Respondent was privileged to establish that term unilaterally without running afoul of Section 8(a)(5).

Dated, Washington, D.C. January 3, 1996

Charles I. Cohen, Member

NATIONAL LABOR RELATIONS BOARD

Bruce E. Buchanan, Esq. and John H. Goree, Esq., for the General Counsel.

[1] See my and former Member Stephens' dissent in *Canteen Co.*, 317 NLRB 1052 (1995), including my personal fns. 5 and 6. See also my concurrence in *Staten Island Hotel*, 318 NLRB No. 90 (Aug. 29, 1995).

Tim Boe, Esq., Jim Hunter Birch, Esq.,[1] and *Mark A. Peoples, Esq., (Rose Law Firm)*, for the Respondent.

James O'Connor, Esq. and *Chad Farris, Esq.*[2] *(Youngdahl, Trotter, McGowan & Ferris)*, of Little Rock, Arkansas, for the Charging Party.

DECISION

STATEMENT OF THE CASE

THOMAS R. WILKS, Administrative Law Judge. On April 7, 1989, the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) (the Union) filed the initial unfair labor practice charge in this cases against Universal Die Casting, Inc. (UDC) and Precision Industries, Inc.[3] (PI or Respondent), and an amended charge on May 8, 1989, solely against PI. On May 25, 1989, the Regional Director for Region 26 issued a complaint against PI wherein it is alleged that PI violated Section 8(a)(1) and (3) of the Act on or about October 18, 1988, by discriminatorily refusing to hire the former employees of UDC at Malvern, Arkansas, because of their prior representation in an appropriate bargaining unit by the Union, and in order that the Respondent avoid becoming a successor employer by virtue of majority employment of former UDC employees in its unchanged continuation of UDC's business operations which it had acquired. The complaint also alleged violations of Section 8(a)(1) and (5) of the Act by PI's refusal on or about "February 20, 1989 and/or May2, 1989," to recognize and bargain with the Union as the exclusive bargain-

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[1] Appearance of Jim Hunter Birch withdrawn during the course of litigation.

[2] Appearance of Chad Farris withdrawn during the course of litigation.

[3] The name of the Respondent appears as amended pursuant to complaint amendment of October 15, 1990.

ing representative of its employees in the appropriate Malvern, Arkansas production and maintenance bargaining unit.

Respondent filed its timely answer on June 9, 1989, wherein it admitted the jurisdiction of the Board, the labor organization status of the Union, and certain agency allegations except for that of Dr. Mamdouh Bakr whom it had employed, it alleged, as an "independent contractor/consultant." Respondent admitted the assets-only purchase of UDC but denied the operative successorship and labor practice factual allegations, including the appropriateness of the historic production and maintenance unit at the UDC Malvern plant as memorialized in a series of collective-bargaining contracts. Respondent admitted receipt of union counsel's May 2, 1989 letter demand for recognition of the Union as bargaining agent for the unit employees. Respondent asserted a refusal of recognition on grounds that the Union failed to demonstrate majority representation status. Respondent denied a February 20, 1989 union recognition and bargaining request in letter form as alleged in the complaint.

As affirmative defense, Respondent's answer asserted, inter alia, that the Union failed to make a proper demand for recognition and bargaining demand supported by evidence of majority status and asserted further that its conduct was motivated by "lawful business, management, entrepreneurial or other legitimate reasons," that Respondent acted pursuant to "sound legal, accounting and other professional or expert advise," and that as a purchaser of UDC assets it had the "right to set the initial wages, benefits, terms and conditions of employment, including but not limited to employee qualifications."

Dr. Bakr's status as Respondent agent is relevant to his conduct with respect to the selection, development, and application of an open employment screening-testing-physical examination process instituted by Respondent on the resumption of operations at the former UDC facilities at Malvern, Arkansas,

after acquisition by PI, and somewhat later in early 1989 at the former UDC facility at Little Rock, Arkansas. UDC's operations were ongoing except for a short hiatus caused by the PI hiring process.

On November 13, 1989, the trial opened and commenced before me at Little Rock, Arkansas. That opening session, and a preceding pretrial telephone conference, was consumed with the consideration and ruling on of Respondent's and Dr. Bakr's motions to revoke subpoenas duces tecum served on them by the General Counsel covering a vast amount of records and documents related, inter alia, to Respondent's Malvern plant job hiring procedures and its relationship to other corporate entities for the purpose of proving a disparity of hiring procedures at other places of business as a single or joint employer.

The General Counsel and the Union rejected Respondent's offer to submit information, that I ruled was related to the issues in the case, under a stipulated protective order to insure certain confidentiality. Without the stipulated protective order, Respondent refused compliance. Accordingly, the trial was adjourned without date to permit the General Counsel to seek subpoena enforcement before the United States District Court, Eastern District of Arkansas. The General Counsel's reasons for not seeking an investigative subpoena in the first place are stated on the record of the September 13, 1989 session.

On December 27, 1989, United States District Judge Stephen M. Reasoner issued a *consent decree*, whereby the terms of compliance with General Counsel's subpoenae was stipulated and agreed to by the parties. Among the terms of Judge Reasoner's decree was, in effect, a very similar protective order proffered at the November trial. Pursuant to Judge Reasoner's order, large portions of the exhibits and official transcript in this case were sealed and testimony taken in camera to preserve certain matters of business confidentiality of Respondent and

Dr. Bakr. In compliance with that decree, I have referred to the material covered by it only where necessary for an adequate finding of fact.

On January 17, 1990, the General Counsel moved to resume the hearing on April 2, 1990. An appropriate order of resumption issued, but on March 8, 1990, the General Counsel filed a motion, which was granted, for indefinite postponement because he needed more time to review the massive amount of documentation produced in compliance with the consent decree.

On June 22, 1990, the General Counsel moved to amend the complaint by filing an amended complaint. The amended complaint reduced the number of alleged discriminatees at the Malvern plant from 77 persons to 62. However, it now also alleged that Respondent discriminated against 19 named former employees at the former UDC Little Rock plant acquired by PI in October 1988 by virtue of its refusal to continue their employment at Little Rock since on or about February 1, 1989, a date when, because of uncontroverted business reasons, the Little Rock plant was closed and its employees, it is alleged, were required, as innocent victims, to undergo an unlawful, discriminatorily motivated and discriminatorily applied screening-testing-physical examination hiring process at the Malvern plant as a condition of their transferred employment from the Little Rock plant. The amended complaint alleges further violation of Section 8(a)(1) and (5) of the Act by virtue of Respondent's unilateral changes in terms and conditions of employment of bargaining unit employees at the Malvern plant on or about October 18, 1988, with respect to wages, health insurance benefits, life insurance benefits, pension plan benefits, and job classifications. The complaint was so amended by order of July 23, 1990.

On June 29, 1990, the General Counsel, having nearly completed his review of the subpoenaed documents, moved to

resume the trial. Accordingly, litigation resumed on September 17, 1990, on which date I granted the General Counsel's further amendment to the complaint which alleged the single employer and single integrated enterprise status of PI, Pace Industries, Inc., and General Precision Tool & Die, Inc. The amendment also adds subcontracting as one of the unlawful unilateral changes and deletes the names of J. Archer, R. Banks, and J. Williams as Little Rock discriminatees.

Respondent filed an appropriate amended answer and denied the alleged operative facts of the amended complaint, Respondent filed two motions to dismiss on September 17 and 28, 1990, which I denied.

On October 15, 1990, I granted the General Counsel's motion to add Automatic Castings, Inc. (ACI) as a joint employer and single integrated enterprise with Respondent.

The trial which commenced on November 13, 1989, therefore resumed on September 17, 1990, and continued on through September20, from October 15 through 18, from November 5 through 8, and from December 3 through 5. Although opportunity was given for ongoing unsuccessful settlement discussions, the trial continued in accommodation with the schedules of all parties through 1991, from January 15 through 18, February 11 through 15, March 4 through 7, April 1 through 4, May 20 through 23, June 17 through 20, July 8 through 11, July 22 through 25, November 4 through 7, and November 18 and 19. Fifteen weekly sessions of often intensive, concentrated litigation resulted in a transcript of about 12,960 pages and 2 cartons of documentary evidence, inclusive of videotapes, photographs, and written records.

During the course of the trial, Respondent moved to strike the testimony of General Counsel's proffered expert witness, industrial psychologist Dr. Sylvia Joure, inter alia, on the grounds that she disobeyed my instructions that she not discuss her testimony

with anyone on those occasions when she was excused from the hearing room while procedural points were argued. My refusal to strike her testimony and to take the issue under advisement in consideration of her overall credibility was, by means of an interim appeal presented to the Board, where Respondent also attacked the ethical conduct of counsel for the General Counsel with respect to their participation in the presentation of an exhibit offered into evidence during Joure's redirect examination for the purpose of revising an exhibit identified by her in her direct examination as her work product. Dr. Joure admitted that the revision was constructed as a result of and during telephone conversations with her associates in Memphis, Tennessee, during the time she was under my foregoing instructions. Joure was inexperienced as an expert witness. The revision itself is of minor significance, and, as will be revealed hereinafter, I placed no reliance on Joure' testimony in resolving the issues of this case because it was unnecessary to do so. Counsel for the General Counsel's expressed motivation was that the witness had discovered an error in her computation that warranted correction. The witness engaged in the proscribed conversations unknown to counsel for the General Counsel. Despite what might be said of the quality of their judgment in the matter, their conduct was not calculated to adduce false evidence but, rather, to correct what was disclosed to them as slightly erroneous evidence that had been unwittingly adduced during direct examination. I did not find it necessary to rely on that evidence. The Board did not express any sanction on them nor did it order me to investigate their conduct or pass judgment on it.

During the course of the trial, Respondent raised numerous complaints and allegations not only as to the investigative pretrial conduct of counsel for the General Counsel as well as their trial behavior, but Respondent also attacked the motivation of their superiors as to the issuance of the complaint. Respondent, inter alia, sought to adduce evidence that the issuance of complaint was an act of selective prosecution motivated by

political considerations because Respondent's principals are known by the Regional Director and the Union to be significant financial contributors to the Republican Party. Although I permitted Respondent to make offers of proof as to such issues, I ruled them to be extraneous to my authority and to the issues in this case as circumscribed by the complaint, i.e., the facts would determine whether or not Respondent violated the Act. Whether or not the Regional Director failed to act against employers for whatever reasons, whether proper, improper, or simply because of malfeasance, is beyond relevance and my jurisdiction. I excluded from these rulings any evidence that Respondent might proffer as to the General Counsel's agents' subornation of perjury, or interference or undue influence on a witness, or other improper manipulation of or suppression of evidence. There was no such proffer. Testimony elicited as to the General Counsel's thoroughness or lack thereof in investigation the case did not amount to such impropriety such as to affect the competency of evidence, and I pass no judgment on the quality of the investigation nor the quality, wisdom, efficiency, or proprietary of any party's trial tactics and the numerous ad hominem attacks of all counsel on each other. If I were to do so, this decision would be compounded by a factor of 10.

During the course of the trial, I curtailed evidence which, although otherwise relevant, warranted exclusion pursuant to discretion afforded to me under Federal Rule 403, in that it was unduly burdensome, cumulative, unnecessarily confusing to the record and trier of fact, or of such minor probative value that it did not warrant the time and that would be entailed.

I also curtailed a substantial amount of rebuttal evidence proffered by the General Counsel and the Union but, however, in part, for the additional reasons that it was not proper rebuttal evidence, given the issue as framed by the General Counsel and given his litigation strategy, i.e., 611(c) witnesses wherein evidence arguably of Respondent's defense were elicited and

rebutted as part of the case-in-chief. Thus the General Counsel having elicited and attacked Respondent's defenses in the case-in-chief was not permitted to revisit those issues and relitigate with additional evidence what he previously litigated. Nor was the General Counsel or the Union permitted to rebut factual defenses which Respondent had not established nor attempted to established.

Despite the foregoing restrictions, all parties were given full opportunity to adduce, to reasonable and arguably unreasonable extent, competent, relevant, and material evidence and, in so doing, to fully examine and cross-examine witnesses. All motions to reopen the record by whatever means, including Respondent's motion to adduce the court reporter's sound recordings of Dr.Joure's testimony, are denied.

Because of the monumental state of the record and the complexity of factual issues in this case, a significant number of which are unnecessary of resolution given my ultimate factual findings, the parties were afforded by me through mutual stipulation the opportunity to file briefs at a delayed date of March 18, 1992, and answering briefs thereafter. Subsequently, on motions of the parties to the chief administrative law judge, those dates were periodically extended so that the briefs were finally filed on July 21, 1992, and answering briefs filed on October 5, 1992. Respondent's brief was 1049 pages in length, exclusive of appendices. The General Counsel's brief was 200 pages long, and the Union's brief was mercifully only 74 pages in length.

Respondent's reply brief was pared down to 136 pages, the General Counsel's reply brief to 37 pages, and the Union's reply to 41 pages.

The acrimony, disparagement, and personal insults mutually exchanged by the parties during the trial and in their briefs refused to abate and, subsequently, led by the General Counsel, a variety of motions to strike portions of opposing briefs and

response briefs to the reply briefs ensued. The General Counsel did so despite his acknowledgement that he was aggravating a "paper war." The vast preponderance of the mutual diatribes there related to alleged mischaracterization of what was in the record and thus was unnecessary because the record itself is there to be read.

Instead of such a barrage of personal invective, it would have been more helpful to the trier of fact for all parties to have addressed themselves more fully to the contradictions in testimony of their own witnesses. I find that it is the most expeditious procedure to deny all motions to strike, of whatever nature, and to receive and to consider all post-reply briefs, i.e., the General Counsel's 19-page December 15, 1992 reply to Respondent's reply brief; the Union's 17-page December 28, 1992 response to General Counsel's motions to strike, etc.; Respondent's January 4, 1993 response to the Union's motion for leave to file a brief; and Respondent's February 8, 1993 11-page rejoinder to the General Counsel and Union's reply to its reply briefs. Despite the excessive verbosity and extraneous insults, each side presented cogent, incisive, well-expounded arguments amidst much chaff.

On the entire record of this case, including an evaluation of documentary evidence and the much disputed testimony of numerous witnesses, and on my observation of their demeanor and in consideration of those lengthy briefs, all of which were read, I make the following

I. JURISDICTION

At times material to the assertion of jurisdiction in this case, Respondent PI was a corporation engaged in the manufacture of die casting products at an office and plant located in Malvern, Arkansas, and from about October 1988 until about February 1989, at a plant located in Little Rock, Arkansas.

The record reveals, and the Respondent admits, that it meets the appropriate criteria for the assertion of Board jurisdiction.

Accordingly, I find, and it is admitted, that Respondent PI is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. By virtue of that finding, all entities found here to constitute a single employer status or single integrated enterprise with Respondent are accordingly subject to the jurisdiction of the Board.

II. LABOR ORGANIZATION

I find, and it is admitted, that International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *Background*

1. The business of the alleged predecessor -- UDC

Respondent's alleged immediate predecessor, UDC, had operated a die casting business under the principal ownership and management of Lewis Zachery located at its corporate headquarters and plant in Saline, Michigan, characterized as its northern division, and offices and plants located at Malvern and Little Rock, Arkansas, which constituted its southern division. The southern division employed about 100 production and maintenance employees at the Malvern plant and about 50 production and maintenance employees at the Little Rock plant.

UDC, under Zachery's ownership, was by no means a new business but was rather a continuation of operations that dated back to 1952, known first as Glenvale Products, then as Hoover Ball and Bearing Company, and later Hoover Universal. Under all those prior manifestations, the UDC production and maintenance employees at the Malvern plant had been represented by

the Union under a series of collective-bargaining agreements, the last of which was a 3-year term agreement which was due to expire on May 6, 1989. As of October 1988, the local management of the Malvern plant consisted of Plant Manager Michael (Mike) Nowak, Industrial Engineer David Watson, and Personnel Administrator Margie Kratz.

The Little Rock plant management consisted of Plant Manager and UDC Southern Division Sales Coordinator Roger Connor, Manufacturing Manager Dale Kindy, and UDC Southern Division Sales Associate Debbie Key.

The overall management of the corporation was located at Saline under Zachery. Headquartered there was also UDC Corporate Personnel Director Patricia Nader (until July 1988).

The Saline plant engaged in the production of nonaluminum alloy die cast products, a major portion of which was dependent on one of the major automobile manufacturers and the loss of which in 1987-1988 precipitated UDC's financial distress and vulnerability to acquisition. The Malvern plant engaged primarily in aluminum die casting and some brass die casting, the latter of which had, by October 1988, declined from a rather significant portion of its business to only a negligible amount. The Little Rock plant also engaged in aluminum die casting until its February 1989 closure when its customers thereafter were serviced from the Malvern plant where some of its machines were transferred. The latter's die casting machinery was of a larger tonnage than Malvern. Neither Little Rock nor Saline employees had ever been represented by any labor organization.

2. The Malvern plant

An aluminum die casting business can manufacture products which it sells directly to customers by use of its own machines. That type of work is called "proprietary," i.e., because the die caster owns the casting dies. Proprietary die casting constituted

about half of the Malvern plant business in the fall of 1988. The Malvern plant, as a proprietary die caster, maintained a long-term relationship with certain customers that effectuated stability of operations. The Malvern plant had dominated the national market for aluminum die cast, small, spoked water fixture handwheels, most frequently seen by the casual observer on outdoor or basement water spigots. The vast preponderance of the Malvern plant proprietary production consisted of those handwheels which were purchased primarily by one customer. However, the Malvern plant also produced such proprietary productions as "tee handles," lock nuts, and certain plumbing parts, and there is unrefuted evidence that UDC and PI continued to solicit other proprietary work. There is no evidence that proprietary work is inherently long-term work, although there is some testimony that it is usually a stable market.

A die cast operation may also engage in production of die cast products for sale to a customer who owns the manufacturing die which is placed for use of the die casting manufacturer in its plant and to be operated by the die caster's employees. When a custom work contract is completed or when the contract is terminated for some other reason, unilaterally or bilaterally, those dies are removed or "pulled" by the customer from the die caster's plant.

Custom work may be done on direct contract with the ultimate user, e.g., automotive or lawn mower parts for the original manufacturer, or it may be done pursuant to contract with a supplier of such parts. There is unrefuted testimony in the record that some kinds of custom work can be long term and have a high margin of profit because of high volume of product per machine, such as a flywheel the Malvern plant produced for a lawn mower manufacturer.

Testimony also discloses that there is a great amount of custom work that is low volume and short term. In the latter kind of custom work, there is a great deal of competition in an already competitive industry. The die caster of such short-term custom

work experiences frequent turnover of dies and therefore the type of products it produces. It must constantly solicit work and be able to satisfy the quality control programs of the customer. An example of such quality program is the Ford Motor Company policy of in-house inspection and monitoring of the quality of production of the die caster subcontractee with whom it has placed its dies. On final approval of a regimen imposed on the die caster by Ford toward a completely satisfactory quality control program, Ford awards a "Q-1" rating. Other manufacturers have quality control programs of varying stringency. However, testimony is unrefuted that the Ford Q-1 designation is highly sought after and, if won, it gives a soliciting die caster sales advantage, even with non-Ford customers. That same testimony reveals that to be awarded a Q-1 rating, Ford demands that its die cast supplier apply the same stringent quality control process on all products produced in the supplier's plant, even non-Ford products. It is further similarly testified that some other clients of custom die work require the same of their customers as does Ford, with the same type of quality control process required by Ford, known as "statistical process control" or SPC. The SPC process entails an ongoing quality monitoring by machine operators and others, and prognostication of quality deviation through frequent periodic checking, measurement, calculation, and graph charting. Thus the worker is able to predict or foresee the development of a quality deviation from the required multifaceted dimensions and/or casting surface or internal structural condition of the product, and the employee is obliged to take corrective action to stop that trend.

Custom products vary in size and complexity, and not all custom clients mandate SPC or other stringent in-house quality programs as do Ford and similar manufacturers. As of fall 1988, half of the Malvern plant's sales volume was due to custom work. Prior to that, but progressively declining over recent years, the Malvern plant had also engaged in a significant amount of custom brass die casting.

The types of custom castings produced by UDC included end frames, automotive brackets, automotive oil shaft seals, rails, lids, cams, pistons, lighting housings, end caps, tractor steps, lawn mower flywheels, reclining chair levers, lawn mower ignition brackets, motor mounts, and cable harnesses for about 15 different customers.

From July 1, 1987, through October 14, 1988, UDC serviced at one time or other about 23 major customers, each over $90,000 in sales. Of those customers, only a few were proprietary customers but they included the handwheel customers, one of which alone accounted for over $ 1.5 million of the custom sales, the lawn mower flywheel account was worth somewhat under $900,000.

Unlike Malvern, the Little Rock plant exclusively produced custom work, some of which was for the Ford Motor Company, for which the plant was being inspected periodically by Ford under its Q-1 progressive qualification program. According to disputed testimony, the Little Rock plant had attempted to implement plantwide SPC, as required by Ford, but the Malvern plant had only a limited application of SPC. The degree of SPC implementation at both plants is also subject to some dispute.

The Malvern plant employee job classifications can be generally described as follows: die cast operator, trim press operator, machining operator, paint racker, laboratory finisher, cleaning and processing operator, inspector and packer, lathe operator, paint machine operator, die cast setup, furnace tender, shipping and receiving employee, stock handler, maintenance employee, tool and die maker, supply room attendant and custodian.

The flow of work at the Malvern plant followed the receipt, unloading, weighing, and stacking of aluminum ingots; the transport of the ingots to furnaces for melting, and transfer of molten alloy to holding furnaces adjacent to the die cast machines, at which point that machine operator would oversee a

process of open die preparation, closure, injection of metal, die opening, casting retrieval, and placement on a nearby table for buggy transport to the so-called trim presses located elsewhere in the plant. On their transport there, the castings were trimmed of excess metal by means of trim presses or trim dies, after which the product was again transported to another area of processing referred to as secondary operations where it would be subjected to the appropriate drilling, tapping, milling, sanding and grinding called for in the customer's specifications. The Malvern plant had a variety of secondary machinery job classifications, some of which required inspection with gauges or micrometers. The final secondary function effectuated the ultimate cosmetic treatment of cleaning and/or flash removal of deburring by use of certain dedicated machines. Certain parts, such as handwheels, were painted in a room designated for that purpose.

In addition to the ongoing flow of work directly related to the product emanation was, of course, that work necessary for the building and maintenance of the plant's own tools and dies and for the setting of the die casting and trim dies. The usual supply room functions also attended the maintenance of work flow.

3. Precision Industries, Inc.

The creation of PI began in the minds of Bob Gaddy and his associates, primarily of whom was James Keenan for the purpose, Gaddy explained, of assembling a group of aluminum die casting and related tool and die making businesses. Gaddy's background is one of accounting and financial planning. He is a certified public accountant. His prior business, Gaddy and Co., founded in 1970, specialized in tax and financial planning with a special orientation for "turn arounds" of businesses in financial distress and came to be the second largest of its kind in Arkansas. James (Jim) Keenan was one of his close friends and clients for whom Gaddy serviced his many investments.

Keenan founded Pace in 1970 in Harrison, Arkansas, which, over the years, maintains a work force of from 400 to 800 employees engaged in thin-walled aluminum die castings which have since captured the national market for gas grills and outdoor lighting housings. As of August 1988, Keenan owned 27 percent of Pace stock and Gaddy 8 percent. Nine other stockholders owned 1-percent to 11 percent, of which Scott Bull owned 4-1/2 percent, Jim Alford and Ben Thigpen each owned less that 1 percent. Of nine officers, Keenan was chairman and chief executive officer, Gaddy was president and chief operating officer, Jim Alford vice president, and Scott bull vice president of marketing. Jim Starkey, a friend of Gaddy's since the early 70's, became vice president of Pace Manufacturing, a stockholder and plant manager at the Pace Harrison plant, the success of which is credited to him by Gaddy.

The Pace Harrison plant maintains an aluminum die casting business that functioned much the same as that of UDC. It had similar type machines, and products that facially had similar features. Its castings weighed from 18 to 24 pounds and were larger in dimension that than of UDC. It also utilized die cast operators, trim press operators, finishing department employees who performed similar functions, as well as maintenance employees. The flow of work was also similar to UDC. The Pace employees use gauges and also a spectrograph to analyze metal alloy content and quality and have used SPC to an even smaller degree than the Malvern UDC plant. Gaddy testified that Starkey's ability is perceived to be the chief factor for Pace's success and that Starkey is opposed to the plantwide use of SPC or to the acquisition of products that require it or deviate from the large thin-wall type casting Harrison Pace produces.

Alford testified that Pace's labor relations policy is established, controlled, and implemented by its seven-person board of directors, including Gaddy, Keenan, and persons related to him (who are often absent from board deliberations), as well as

Starkey and Terry Bellora, a 2-percent stockholder and vice president of finance. There is no history of union representation at the Pace Harrison plant. With a yearly turnover of 200 employees, it hired its job applicants by means of a two-page application of general questions, without written tests, manual dexterity tests, physical examinations, or back X-rays.

Offices in Fayetteville, Arkansas, originally served as Pace's corporate headquarters and business records repository.

Originally, Gaddy personally handled sales solicitation for Pace but later, as it expanded, Scott Bull took over that function for about 8 years until finally Ben Thigpen was hired to supplement him as Pace's sales manager. Gaddy testified that prior to October 1988, Thigpen scoured the aluminum die casting market for potential sales and to discover where that market was heading and that they decided that it was in the direction of the type of product opposed by Starkey and which involved plantwide SPC which Starkey opposed. Gaddy testified that he considered it to be foolish and not cost effective to interfere with Starkey's successful non-SPC operation at Harrison. He explained that because he wanted to acquire what was perceived to be the only open avenue of die casting growth, it must be performed elsewhere than at the Harrison plant. Gaddy testified that before October 1988, he decided to establish a multiplant aluminum die casting operation with its executive offices located at Fayetteville, Arkansas, the site also of his accounting business. Thereafter, Gaddy and Keenan commenced their search for the acquisition of aluminum die casting operations which, according to Gaddy, could serve as the basis for acquisition of customers not acceptable to Starkey. According to the testimony of Gaddy and Thigpen, the UDC operation was purchased because it was SPC capable. Neither Keenan nor Starkey testified.

Jim Alford's experience, like Gaddy, had been accounting. He is a certified public accountant and had achieved much experience in business acquisition consultations. According to

Alford, he and Gaddy had discussed the possibility of jointly acquiring a die casting business during the period form 1974 through 1988 but nothing coalesced until he became involved in discussions with Keenan and Gaddy in 1987-1988. Pace had been Alford's client since 1979, and Alford audited it yearly. Alford testified that he decided to join Keenan and Gaddy in their effort to acquire an aluminum die casting business receptive to the SPC process and capable of producing more complex castings than simple thin-wall, large die castings that Starkey had specialized in at Harrison.

Keenan and Gaddy did not use Pace as a means to acquire UDC's assets because of the desire to eliminate one of the other minority Pace stockholders from the business and because Pace's bank would not agree to Pace's acquisition of UDC assets by means of its own financing. For uncontroverted financial and business reasons, it had been determined that an asset purchase was more appropriate rather than a corporate stock acquisition. It was clear that they wanted to acquire and continue an ongoing business. Since Pace could not acquire the assets of UDC for which Alford had negotiated acquisition, Gaddy, Keenan, and Alford formed a new corporation for the purpose of acquiring all of UDC's assets and to continue with and expand UDC's product mix. Gaddy purchased UDC's plant, machines, tools, goodwill, contracts, trademarks, licenses, and all its incidental assets by means of the assumption of long-term industrial development revenue bonds and a note payable to Zachery over 7 years. Keenan, Gaddy, and Alford formed the new corporation, Precision Industries, Inc., and Keenan assumed his portion of the debt for PI stock that Gaddy issued to him. Gaddy contributed the former UDC assets into the corporation. Stock was issued to other persons.

Thus, on September 7, 1988, PI was incorporated in Arkansas. On October 15, 1988, Gaddy purchased the UDC assets and on October 17, he transferred the assets to PI for 46.5 percent of the

stock. Keenan obtained 53.5 percent of the stock. The original officers were Gaddy, chairman of the board and chief executive officer; Alford, president and chief operating officer; Bellora, vice president of finance, treasurer, and assistant secretary; Richard Ardemagni, vice president of administration (also the same position at Pace where he had a 5-percent trust ownership interest and prepared tax returns); Carolyn Madison, secretary (also 1 percent Pace owner and Pace secretary); and later, on his postacquisition hiring by PI, Nowak as vice president of manufacturing. The ownership of PI also overlaps the ownership of Pace as follows: Keenan about 53 percent, Gaddy 18.5 percent, Alford 7.5 percent, Starkey 6 percent, Bull 4.5 percent, Ardemagni trust 4.5 percent, Bellora 2 percent, Madison 1 percent, Thigpen 1 percent, Nowak 1 percent. However, 1 percent each was owned by a Howard N. Higgins and Richard T. Smith.

The records of both PI and Pace were maintained at their mutual corporate office at Fayetteville where Madison and Ardemagni performed identical services for both corporations. Thigpen and Bull had responsibility for sales and marketing for both corporations.

On Friday, October 14, 1988, UDC was closed and its employees were told to apply in open competition for their old jobs by submission of a 19-page written application. Those who applied were subjected to a preclosure conceived application-screening-testing physical examination hiring process so stringent that only 22 of about 103 former UDC employees who applied were hired. (Only 62 rejected UDC applications are alleged as discriminatees.) In a field of over 500 more non-UDC applicants, who also applied pursuant to public solicitation over a 3-day hiring period at closure, there was an even higher ratio of rejections. Although production resumed in early November 1988 with 40 to 50 employees, the employee complement did not stabilize until January 1989 at about 70, grew to 84 in May, and declined to 75 in June 1989.

The motivation for the institution of that hiring procedure which necessitated an admittedly undesirable disruption in business operations which had intended to be continued by PI, rather than the immediate reinstatement of all former employees, some of whom had many years of experience, is a matter of dispute.

A participant in the formulation and application of the PI hiring process, including but not limited to the tests, is Dr. Mamdouh Bakr, an industrial engineer and private sector business consultant who also occupies a respected academic position at the University of Arkansas at Little Rock (UALR). Reference here will also be made to SPC and its relation to Dr. W. Edward Deming. Identified in the record as a statistician, Dr. Deming was part of a group of consultants invited to Japan by General Douglas MacArthur at the end of the World War II to assist in the revitalization of Japanese industry. The "Deming Philosophy" of manufacturing was ignored by industrial United States but embraced by Japanese industry, and the rest is history.

Dr. Deming promulgated his famous "The Fourteen Obligations of Top Management," which, according to expert testimony of Respondent witnesses, formed the basis from which evolved "one of the most significant training programs in this country," i.e., "The Transformation of American Industry," developed by Jackson College in Jackson, Michigan. According to that testimony, it reflects the mindset and philosophy of Dr. Deming and SPC is but one effect thereof. Its three sponsors are Eaton Corporation, General Motors Corporation, and the Ford Motor Company.

4. Related enterprises

Mangus Tool and Die, Inc. (Mangus) was a tool and die manufacturer located in Muscle Shoals, Alabama. It had built dies for UDC, Pace, and PI with a skilled work force of about 35 employees under its general manager, George Spellings. On October 12, Keenan and Gaddy purchased 79 percent of Mangus

stock and the balance was purchased by Spellings. Its operation continued, without change, termination or rehiring of employees. On October 18, General Precision Tool and Die, Inc. (GP) was incorporated in Arkansas. Stock ownership was very closely similar in proportion and identity to that of PI. The officers and directors reflected the same similarity to PI, i.e., Gaddy, Keenan, Alford, Bellora, Ardemagni, and Madison.

On November 14, Mangus was merged into GP, which, according to Alford, was for tax benefit purposes. On November 29, Gaddy and Keenan purchased the stock of South Central Tool and Die, Inc. of Florence, Alabama. With a skilled work force of about 30 employees, it had also engaged in the production and repair of tools and dies. No changes were effectuated, and the employees were retained in the ongoing business. It was also merged into GP on November 30 with no impact on the nonunion represented employees' continued employment. Subsequently, Mangus and South Central operated as divisions of GP.

GP's corporate functions were carried on as PI's were at Fayetteville, e.g., Ardemagni prepared its tax returns. GP's skilled employees work with heavy dies and tools, must lift heavy objects, and are required to read blueprints. They were unscreened and untested on the corporate acquisition of their employer. The acquisition of these tool and die businesses benefited PI and Pace which was assured of priority in source and the potential of lucratively referring customers in need of tool and die service.

Automatic Castings, Inc. (ACI), an Arkansas corporation, was located in Green Forest, Arkansas, where its 40 to 45 employees (at most, 80) engaged in the production of aluminum die castings with same or similar machinery, job functions and work flow, as had UDC employees, which produced a mix of proprietary and custom castings. On January 4, 1990, Gaddy and

Keenan purchased all of the assets of ACI, and it was reincorporated in Arkansas on January 6, 1990. Gaddy, Keenan, and Dan Jones constituted the directorship. The ownership and its proportions were identical or similar to PI except that Jones had a small share. The officers in function and identity mirrored those of PI.

Thigpen joined Jones with respect to sales responsibilities. The corporate officer were located with Pace at Fayetteville where common personnel performed its corporate functions. ACI, PI, and Pace maintain the same workman's compensation policy and share two of the same aluminum ingot suppliers. ACI loaned money to PI without collateral or fixed repayment date, which was repaid without interest. ACI purchased fence fitting products produced for it by PI. Fence fittings were one of ACI's major products. In certain business dealings, PI and ACI described ACI as an "affiliate of" PI. Pace has provided to ACI, at a fee, administrative, banking and computer support, corporate records maintenance, salary and payroll preparation, tax return preparation, and sales and marketing service. A variety of other services are performed by common personnel.

On June 30, 1990, PI, GP, and ACI entered a merger whereby they became divisions of Pace. The surviving directorship is that of what was the Pace board of directors. The owners of PI, ACI, and GP were sold proportional shares of Pace stock. The labor relations of PI were determined by Gaddy, Keenan, and Alford who also, with Spellings and Thomas did the same for GP. Gaddy, Keenan, and Jones determined ACI's labor relations. At Pace, Gaddy, Keenan, Bellora, Starkey, Flinn, and three relatives of Keenan held that responsibility.

PI and Pace serviced several common customers. Pace performed a variety of administrative, banking, and salary payroll functions for PI, and they both leased equipment to each other. Subsequently, the main office of Pace was moved to Malvern, Arkansas.

Although the Respondent does not argue the issue in its briefs, its answer denies the single employer allegations in the amended complaint. I conclude, on the foregoing evidence, that the General Counsel has established Pace, PI, GP, and ACI as a single employer even prior to their merger with Pace, by demonstrating sufficient community of ownership management, control of labor relations, and interrelations of operations. *Radio Union Local 1264 v. Broadcast Service*, U.S. 225 (1965); *Bryer Construction Co.*, 240 NLRB 102, 104 (1979); *Airport Bus Service*, 273 NLRB 561 (1985).

B. *Direct Evidence of Discriminatory Motivation*

The General Counsel adduced evidence, which, if credited, is argued to be direct evidence of unlawful motivation for the PI hiring process at Malvern. That evidence is found in the testimony of Roger Connor and Deborah Key. Their testimony also evidences a large portion of the alleged animosity toward union representation. That evidence and other evidence of such animosity, in conjunction with other circumstantial evidence, is also argued by the General Counsel to support an inference of unlawful motivation in whole or in part, if evidence of direct unlawful motivation is found to be insufficient. However, it is the position of the General Counsel that the credible evidence of direct unlawful motivation is sufficient to support a finding that Respondent effectuated the very decision to impose any screening on the UDC employees prior to their being hired by PI to resume the pre-existing job functions necessary to fulfill outstanding customer needs and to satisfy the hoped-for progressive future increase in newly solicited work. Thus the General Counsel argues that had it not been at least or in part for the acknowledged concomitant obligation to recognize the Union on the hiring of more than half of the UDC employees, Respondent would have recalled them to their former jobs without screening and testing them, and without physical examinations and back X-rays. If the General Counsel prevails with this

theory, the entire screening process itself was unlawfully instituted regardless of whether it is inherently reasonable or unreasonable, regardless of whether it was reasonably or unreasonably applied, regardless of whether it inherently discriminated against incumbent employees or did not inherently discriminate, or regardless of whether the process in whole or in part was applied in a manner to discriminate against the incumbent UDC employees by controlling the number of their hiring to a minority point. Thus the General Counsel's first theory is that even if the Respondent effectuated a bona fide inherently nondiscriminatory screening process in whole or in part for discriminatory reasons, then the screening process itself was unlawful regardless of content, and all who failed it were discriminatees entitled to reinstatement regardless of their actual mental or physical ability.

The bulk of the testimony and other evidence, which reached massive proportions, is attributable to the alternative theory of violation. Thus testimony was adduced relating to an analysis of the minutiae of the hiring process, including, inter alia, the reasonableness or job-related nature of tests imposed on the applicants. Indeed, the General Counsel so aggressively pursued the expansive prosecution that it and the Union resisted concessions to the most obvious conclusions that certain processes were not so inherently unreasonable as to necessarily infer pretext and unlawful motivation. Before any analysis is made of secondary evidence of screening motivation, common sense demands that the evidence of direct motivation be first evaluated. That entails an examination and analysis of testimony of Connor and Key, and also an examination of the context of their testimony, e.g., other evidence of union representation animus. Such evidence cannot preclude evidence of union animus of the predecessor UDC because, as is noted elsewhere, PI agents have, without formal screening, retained in place the employment of the Malvern plant managerial and supervisory staff, as indeed of

virtually all its salaried personnel, inclusive of quality control agents. Furthermore, PI agents have testified, albeit inconsistently and contradictorily among themselves, that the very decision to institute a screening and/or a testing procedure was motivated in whole or in part by the recommendations of the UDC Malvern plant managers, who assisted in the formulation of this process with a hired professional and academic industrial engineer and who participated in the establishment of the screening elements and test scoring which determined how many of the UDC employees could pass the screening process and the tests.

Depending on the General Counsel's proofs, Respondent may find itself in the dilemma of either being responsible for the discriminatory motivation of the hired UDC management or having to explain why it decided not to continue an ongoing die casting process with the very same employees who engaged in that process as they had been for many years, but rather decided to oblige them to pass a screening and testing process open to them and to all other applicants in an admittedly distressed economic area of high unemployment, which same area includes a high proportion of aluminum die casting plants and tool and die makers. Respondent, in fact, adduced a massive testimonial and documentary body of evidence as to the alleged reasonable and nondiscriminatory business nature of its hiring motivations. Let us then first consider the testimony of Connor and Key.

At the time of his testimony on October 16, 1990, Roger Connor held the position of operations manager and acting division manager of Harvard Industries at the Ripley, Tennessee, Die Casting Division. He was hired there by Harvard on June 1, 1989, having applied for a position on May 30, 1989. Prior to that, he had been a long-term managerial person at PI and its predecessors at the Little Rock plant and, lastly and briefly, at the Malvern plant. Since his high school graduation, Connor has been involved in the die casting business for 28 years for a variety of employers in various positions, including tooling engineer

and supervisor of 25 die cast machines for a die cast company located in Jackson, Michigan, where he later succeeded to the position of a plant superintendent responsible for 270 employees. After about 5 years there, he became employed at the UDC Little Rock plant in September 1984, where he held the position of chief tooling engineer at both the Little Rock and Malvern plants, to whom 18 persons were directly subordinate.

In June 1986, the then-owner, Lewis Zachery, fired the Little Rock plant general manager. For 2 months, Connor ran the Little Rock plant as the manufacturing manager until August 17, 1986, when Zachery appointed him the plant manager. He held that position until the Little Rock plant closure in early 1989. Connor also became the sales manager for both Little Rock and Malvern plants in 1987 and continued in both functions. Michael Nowak was the Malvern plant manager. Two persons, one of whom was Deborah Key, a sales associate, were directly subordinate to Connor. That arrangement continued until the sale of assets of UDC and the cessation of UDC's operation on Friday, October 14, 1988.

On Monday, October 17, Connor was rehired by PI's president and chief executive officer, Jim Alford, and his duties remained unchanged. Virtually all other Little Rock managers, supervisors, salaried persons, and hourly rated employees were forthwith rehired by PI in an almost pro forma fashion without need for screening, testing, or physical examination.

Alford testified that he decided on October 14, 1988, to hire Nowak as well as Malvern Personnel Manager Margie Kratz, UDC Malvern Plant Industrial Engineer David Watson, and Connor. Alford testified that unbeknownst to Connor, his employment was to be temporary despite admitted representations which reasonably led Connor to believe that his position was permanent regardless of whether the Little Rock plant was ultimately closed. Indeed, on the December 1989 announcement

of the intended closure of the Little Rock plant, Connor was led to believe by Alford and Gaddy that he was to become and, in fact, was made a vice president of PI with a $7000 raise in pay. Further, he was told that he was to become a technical advisor to Alford and Gaddy with respect to customer relations and whose duties would be called on as additional die casting enterprises were about to be acquired by these entrepreneurs. In an attempt to explain the disparity between his alleged temporary intended employment status and what overtly appeared to be permanent status, Alford offered two explanations. First, he admitted somewhat reluctantly that he and Gaddy had misled Connor as to his status and as to the possibility that Little Rock might survive. Thus, although Keenan and Gaddy had adamantly decided prior to purchase that Little Rock was to be shut down, Connor was misled into believing in its possible survival over Malvern, and, supposedly acting out a charade, Gaddy solicited Connor's opinion as to why Malvern, instead of Little Rock, ought to be closed down. Alford, in fact, admitted that Connor was misled because he and Gaddy needed Connor's assistance in transferring the Little Rock customers to Malvern.

Alford went so far as to testify that on the December 1989 closure announcement of Little Rock, he concluded that perhaps Connor might have a future with PI after all. Alford testified that he perceived in Connor a technical proficiency and an ability to relate to customers regarding their technical problems with PI products, which served as a perfect complement to Alford who, as a lifelong account, was admittedly ignorant of the technical aspects of the aluminum die casting industry. Alford testified that he recommended to Gaddy that Connor be retained with perhaps an eye to permanent status. Gaddy, however, either having a greater appreciation of Connor's ability or acting with a greater depth of enhanced deceit, went beyond Alford's recommendations and made Connor a PI vice president with a $7000 per annum pay raise and brought Connor to the Fayetteville headquarters to describe to him his new office facilities. Connor's

testimony is uncontradicted that he told Gaddy that he had some doubts as to just where he would fit into this operation but that Gaddy assured him that he could serve as technical advisor in an expanding operation of accredit die casting, and tool and die plants. Further, Connor was so explicitly assured that, on Gaddy's urging, he committed himself to a lease of a residence in Fayetteville while still bearing the expense of a Little Rock residence. The disparity in Alford with Gaddy's treatment of and representation to Connor with that of a status of temporary employment is so great that either Alford's testimony as to such temporary status is false, or he and Gaddy engaged in extremely deceptive conduct in dealing with Connor. Of course, it is in aid of Respondent's position regarding Connor's credibility that he be perceived by the finder of fact as a temporary employee with whom Respondent's confidence as to unlawful hiring motivation would not be shared. Either way, credibility of Alford and Gaddy is impaired. Ultimately, the objective treatment of Connor up to the point of disagreement as to the handling of the former Little Rock customers, strongly suggests that his status was not originally intended to be temporary. Further, Gaddy and Alford, did solicit Connor's opinions and confidences regarding the continued operation of Little Rock versus Malvern, regardless of whether done as a charade or not.

It was Connor who first broached the topic of the differences in the hiring procedures at the two UDC plants, i.e., the elaborate screening and testing procedures performed at Malvern, contrasted with the almost pro forma retention of UDC employees at Little Rock. Connor testified that he engaged in several conversations regarding this topic the week before and during the first month of PI's operation, but mostly concentrated in the first 3 weeks of that operation.

Connor testified that he engaged in a conversation with Alford about 1 week before the actual testing process commenced, which would have put it at some point in the mid-week prior to

the October 14 closure. Connor testified that during this conversation, Alford first revealed to him that the Little Rock applicants would not be subjected to the same screening process as would the Malvern applicants and that Connor asked him to justify that decision. According to Connor, Alford explained that the Malvern plant was at that time less busy than the Little Rock plant and it was less disruptive to utilize a screening process there. Also, Alford told Connor that higher insurance costs in Malvern necessitated physical examinations at that location. In cross-examination, Connor did not dispute the accuracy of Alford's explanation. However, despite such accuracy, Gaddy and Alford at no time, either during the investigation of the case nor at the trial, ever asserted those reasons as PI's motivating factors for screening UDC employees at Malvern. Alford did not clearly deny this aspect of his statements to Connor regarding the reasons for nonscreening at Little Rock, nor did he clearly deny having the conversation. Again, Alford's testimony would have us believe that the real reason for not screening the Little Rock employees was that a closure decision of that plant had already been made and that it was felt necessary to PI's interest to withhold that true motivation from Connor. If this is true, there is no explanation for Respondent's failure to tell Connor, way back then, the reasons it had advanced later in litigation to be the motivating factors, i.e., the planned expansion of custom die work at Malvern with its alleged inherent unique demands of "statistical process" quality control and doubts that the Malvern work force provided the most capable and adaptable work force. If true, it would have been the most logical and readily available distinction because Little Rock employees, unlike Malvern employees, performed all custom work and had already been trained in the type of quality control processes supposedly intended for Malvern employees. Yet, Alford elected to proffer Connor another false explanation. Again, we see Respondent as being either in the position of misrepresenting in testimony the date of its intention to close Little Rock in order to explain why

it did not screen Little Rock employees, or misrepresenting to Connor its complete intentions as to Little Rock. It is, of course, advantageous for Respondent's defense to establish that the Little Rock closure decision was made final prior to the institution of the screening process rather than afterward.

Connor testified that he thereafter had several conversations with Alford regarding the subject of the testing of the UDC Malvern applicants. He variously fixes the number as two or three, or as three or four, or as "very many." The dates and places of each of these meetings are not always clearly identified, nor does Connor always specify whether anyone else was present. It is also not clear whether the obscurity was due to a lack of recollection or the nature of the questions put to him or not put to him by counsel. Nor was the sequence of some of the topics totally clear until further examination by the Union and Respondent on cross-examination, when Connor became more certain that the next series of conversations with Alford gave rise to the subject of PI's awareness that if it hired a majority of the Malvern UDC plant employees, it would be obligated to recognize and bargain with the Union as their bargaining agent. The obscurity of direct examination was lifted as Connor, with greater certitude, explained the basis for subsequent discussions wherein he raised the subject of the Malvern hiring process by making accusations to Alford and/or Gaddy.

Connor testified that after that pretesting initial conversation with Alford, he had three or four subsequent conversations, commencing no later than October 17, during the first month of PI's operation with Alford about the hiring process at Malvern wherein Alford, in explaining the reasons for testing, told him that if a majority of Malvern UDC employees were hired by PI, there would be a need at least to recognize and bargain with the Union. Connor testified that he did not discuss with Alford the nature of the testing process itself, of which he was then ignorant, but only that Malvern had one and Little Rock did not.

Connor testified with more specificity as to those conversations as follows:

> Jim Alford went on and explained to me that the procedures that they were using, that if less than 50 percent of the employees ended up being former employees, they would not have to recognize the union. But, that if over 50 percent of the new employees were former employees, they would have to at least bargain with the union. He also stated that Mike Nowak had convinced him [Alford] that this was the way to go, that Jim Keenan and Bob Gaddy in particular had some concern about it because it would require shutting the Malvern operation down for at least a week and slowly building it back up. They were worried about how it might jeopardize the customers. But, Mike Nowak had convinced him it was the way to go and that's the way they went.

Connor gave no further context to these conversations, i.e., location, who was present, what specifically was said that precipitated this statement by Alford, or what exactly was said about the hiring procedure before that moment except that it was raised first by Alford in explanation of the Malvern hiring procedure and how it would affect union representation. Thus it is not entirely clear whether Alford's statement was made directly in response to a repeated question by Connor as to why there was a screening process at Malvern. If so, there is no explanation by Connor why he had persisted in asking that question in light of Alford's previous explanation, which Connor admitted was at least based on facially true facts. Connor admitted that it made economic sense to close one of the two plants. He, Key, and/or other witnesses corroborate Alford's explanation that one of the two plants had to be closed, that despite certain advantages to the Little Rock location, it was highly unprofitable, had a higher scrap problem, and was saddled with machinery in desperate need of repair or replacement. If Connor suspected that the Little Rock plant was not put through

a screening process because it was destined to be the choice of an inevitable closure, he did not express it to Alford. Rather, he testified that he construed Alford's reference to the possible bargaining obligation as the motivation for the institution of a testing procedure at Malvern. In direct examination, the sequence of his recollection referred to his accusatory conversation prior to the above testimony regarding hiring ratios. In cross-examination, he explained that Alford's allusions to the hiring ratios and bargaining obligation preceded and motivated his accusations. Thus he testified in cross-examination in answer to my questions:

> I'm stating that on two or three occasions when I had to be in a meeting with whoever happened to be there -- if Mike Nowak was there, I would generally ask him -- I should have been asking him, "What's the ratio of the previous employees versus total employees?" I made the statement. "What's the count? How are we doing on getting rid of the union?" When I was in meetings that Nowak would be involved with, I would ask, "How are we doing on getting rid of the union?" I should have said it differently. I should have said, "How are we doing with ratios? Are we maintaining less than 50 percent former employees versus total or not?" And whenever I would say, "How are we doing on getting rid of the union?" whoever was present would immediately tell me, "We can't say that. Don't say that. We've never said that. That's not the reason."

In direct examination, Connor had testified that in one of those accusatory conversations with Alford, the latter responded." [W]e can never say that," but Alford did not deny it. In examination by the union counsel, Connor testified that his accusations of discriminatory motivations were also made at group meetings and that one of two or three other such accusatory confrontations occurred at the Harrison plant, at which meeting Nowak and Gaddy simultaneously responded. "[W]e

can never say that and we will always deny that is the reason." Again, the context of the conversation, the nature of that and other meetings and other details were not elicited from the witness. As noted above, in cross-examination, Connor significantly changed the nature of responses to his accusations to include a denial which was absent from the first recollected accusatory confrontation with Alford. The General Counsel emphasizes that first conversation in the brief but ignores the subsequent conversations.

Attempt was made to elicit categorical denials with point blank questions as to whether he had made certain statements. Alford denied the truth of Connor's accusations that the Malvern hiring process had been motivated to avoid union recognition. When asked about Connor's accusations, he admitted that from mid-October 1988 to mid-March 1989, Connor had questioned him as to "how it is going with getting rid of the Union" and stated "we all know that they were doing this just to get rid of the Union." Alford testified that he responded that it was "not true and you can't say that."

At this point in his testimony, Alford had an opportunity to supply the context for these numerous conversations. Except for the Harrison meeting, he failed to do so other than to testify that Connor never explicitly stated the basis for his accusations. Alford did not deny that certain other conversations had, in fact, occurred and preceded the accusatory confrontations, i.e., the first conversation where Alford gave a nondiscriminatory but yet false explanation to Connor for the different hiring procedures at Malvern, and subsequent discussions concerning hiring ratios and consequent possible bargaining obligations. Thus he failed to provide an exculpatory, mitigating context to explain why an objective recognition of the impact of a hiring of a majority of UDC Malvern employees may have been discussed between himself and Connor. Instead, we are left only with Connor's version of conversations which had preceded the accusatory conversations.

Alford conceded that there had been a conversation at a meeting at the Harrison plant where a similar accusation was raised by Connor. He placed it in December 1988 at a time after Connor had been apprised of PI's intention to close the Little Rock plant, and where Gaddy, Alford, Kindy, Connor, and "others" were present. Alford testified that the meeting's objective was the coordination of the transferring of machines and supplies from Little Rock to Malvern. He could not recall with any certainty if Key was also there. Alford testified that just before a break in the meeting, Connor asked "how we were doing about getting rid of the Union?" Alford testified that he and Gaddy simultaneously answered that "it was not true" and they both asked "where did you get that?" According to Alford, Connor did not respond but remained silent, looking "sheepish." Alford amended that testimony by stating that Connor "chuckled." Alford's testimony confirms Connor that, indeed, simultaneous responses were in fact made to Connor's accusations, an otherwise dubious spectacle.

Strangely enough, Kindy denied having been present at any meeting where any reference was made to discriminatory motivation with respect to the Malvern hiring process. Nowak's and Key's testimony will be discussed separately.

Gaddy testified that there were no managerial "staff" meetings where the topic of frustrating union representation at Malvern was discussed except for one meeting at Harrison which was one of the few that Connor had attended. According to Gaddy, Connor raised the question of frustrating the Union at Malvern. Gaddy further testified that Connor was "sensitive" about the potential closure of the Little Rock plant and, as he did on two or three other occasions, suggested that avoiding union representation at Malvern was a good reason to select it for closure. Connor did not rebut this and admitted that it was his personal preference. He could not recall making the suggestion but testified that it is something he very well might have done as he prefers a

nonunion plant as a sales solicitation device. Alford's testimony suggests that this meeting dealt with the immediate logistical effectuation of an already made decision, whereas the elicitation by Gaddy of Connor's opinions regarding the choice of plant closure occurred earlier than that. According to Gaddy, he responded at the Harrison meeting that union representation was not a factor in the decisional process, a much less hectic outburst than that described by Alford and Connor.

Gaddy testified to various other nonstaff meeting conversations with Connor at unspecified, undated, context-free occasions when, as Gaddy characterized it, Connor would "try to draw us out" by stating "well, your whole plan was to get rid of the Union. That's why you set this up [the Malvern job applicant screening procedure]," and other comments similar to that testified to by Connor. Gaddy testified to similar response as had Alford, except the somewhat more vehement denial was added, i.e, "it's absolutely not true -- there is no plan, nor ever was one to get rid of the Union ... [but rather the plan was to get a more efficient operation]." Thus Gaddy went well beyond Alford in his version of the denials he and Alford allegedly made to Connor's admitted, persistent accusations of discriminatory motivation.

Although Alford testified that Connor did not explicate the basis of his accusations when he made them either at the Harrison meeting or other confrontations, there is nothing in their own testimony nor any evidence to explain why Connor persistently repeated them. Nor is there any evidence that these accusations engendered any more of a reaction than the alleged disavowals. Again, we are left with Connor's undenied testimony that there had been preceding explanatory discussions of the hiring ratios and its legal consequence on the status of the Union as employee bargaining agent. Moreover, these hiring ratio discussions had been, in turn, preceded by what was clearly an initial false explanation made to Connor as to the hiring differences at the two plants.

In addition to the foregoing conversations with Alford and Gaddy, Connor testified that he had similar conversations with Nowak. According to Connor, he had frequent, even daily contact with Nowak during the first month of PI operation because Connor was concerned about jeopardizing delivery commitments to his customers served by the Malvern plant.

Nowak initially testified that his contact with Connor during that time was "almost nil." In cross-examination, that was changed to "not a lot," and he conceded that the closure of the Malvern plant for a week of employee screening did cause a lag in deliveries which did give rise to customer's concerns, which were in fact conveyed to him by Connor.

Connor testified:

> He also had told me during that time that if we could -- if, after the hiring procedure was completed and we maintained less than 50 percent of the union employees -- former employees, I should say -- we would not have to recognize the union, but on the other hand, if, following these hiring procedures, we ended up with more than 50 percent, we would have to at least bargain with the union. He also said that the first month would tell the story. Within a month's time we could feel pretty comfortable one way or the other [i.e., in knowing the results]. During one of [those] periods, and I believe it was pretty close to the end of the first month, he stated to me that at that time they had 43 employees in the plant and out of that 43, 17 of them were former employees. So, at that point, it looked good. He'd also told me during that time that I really shouldn't ask no questions, that ultimately this would go to court and the less I knew about it, the better off I would be.

Connor testified that he had asked Nowak for a daily count of the hiring mix because customers of whom he solicited business asked him whether PI was unionized. In cross-examination, he

admitted that he assured customers that although unionized, the Malvern plant never lost a day of production in negotiating a collective-bargaining agreement.

Despite the fact that Connor had already referred to the "first month," counsel for the General Counsel elicited the following testimony:

> Q. Now, you testified -- Did Nowak say anything about the first month?
>
> A. He mentioned the first month would tell -- He felt that it would take at least a month before we would have a good feel for what the numbers look like and we will end up with 50 percent or less former employees in the plant.

Thus, by being led over the same ground again, Connor was given a second opportunity in which a more positive intention of hiring less than a majority of UDC Malvern employees was attributed to Nowak.

Connor testified that in early December 1988, in conversations with Alford and Gaddy, he was told of a decision that either Malvern or Little Rock would be closed and that PI was leaning toward closing Little Rock but that they sought Connor's opinion as to why Little Rock should not be closed. Connor's testimony is corroborated by Alford who explained that Gaddy tried to arrange the scenario to make it appear that Connor's opinion was given meaningful consideration when, in fact, the decision supposedly had, long before, become final to close the Little Rock plant. Connor is further uncontradicted that before the final decision was made, he was flown to Fayetteville and shown where his new office was to be located. Thus Connor was already, in effect, notified that he was to be relocated out of Little Rock, i.e., an indirect notification that he was to be relocated and promoted regardless of which plant was closed. Connor did not rebut Gaddy's testimony that Connor was told that the relocation

was also an attempt to separate him from Key with whom he was having an admitted (by her) romantic relationship. Connor did not rebut Gaddy's testimony to the effect that he admonished Connor with respect to that relationship, of which more will be discussed later.

Connor testified that on about December 15, later in the same week of the above conversation, he was notified by Gaddy that the decision had been made to close down the Little Rock operation. He testified that Gaddy's explanation made "good sense" and that he agreed with Gaddy that it was the obvious choice. Connor testified, without contradiction, that in a subsequent conversation, Alford told him that Co-owner Keenan had decided years earlier that if UDC were acquired, Little Rock must be closed and that Connor should not waste his breath talking about it. Thus Connor admits that he did not accept the decision so benignly that he did not try to some degree to cause Gaddy to reconsider the issue. However, Gaddy confirmed Connor's testimony that when first notified of the Little Rock closure, Connor's calm and reasonable reaction was that it was a "good idea."

Alford testified that after Connor was offered the vice president's position in Fayetteville, he insisted that PI offer all the Little Rock supervisors and managers an opportunity to transfer to the Malvern plant. Alford testified that PI acquiesced in the request because it needed to placate Connor whose help was needed in transferring the Little Rock customers to Malvern.

Alford testified that when Connor was notified of the decision to close Little Rock, Gaddy told Connor, as well as Key, that PI would do whatever was necessary to accommodate the Little Rock customers in a smooth transition to Malvern even if it took 6 months to do so. Alford testified that because the November and December sales projection turned out to be much less than expected and because of the loss of Little Rock's largest cus-

tomer, OMC, Keenan had insisted on an immediate closure on reviewing the January report of December sales. Alford testified that when he informed Connor of the decision at a meeting in Fayetteville, Connor vehemently accused him of lying regarding the timing of the decision and also accused Gaddy of breaking a promise as to the length of the period of transition. Alford testified that he thought Connor had become temporarily "insane" because of the vigor with which he complained about the suddenness of the move. Alford became incensed at Connor's failure to acquiesce and, in testimony, characterized Connor as that "S.O.B." and that he had felt the urge to physically strike Connor. Instead, he led Connor to Gaddy who took Connor to dinner where he calmed down. Gaddy testified generally that Connor was irate at the time. Thus, even Respondent's own testimony suggests that Connor was not irate over the closure decision itself nor over his relocation from Little Rock and separation from Key who was to transfer to Malvern. Rather, it was to the acceleration of the closure. Connor actually spent most of the month of February 1989 at Malvern assisting the transfer of machines and customers from Little Rock. He spent only about 2 weeks in Fayetteville until he was terminated in mid-March.

Alford admitted that he had misled Connor at the outset as to the possibility that Little Rock might remain open and withheld information from Connor that would have educated him as to the ultimate closure decision, while Connor was of the impression that Little Rock would remain open. He admitted that based on what he stated to Connor, it would have been reasonable to expect that Connor would have told the Little Rock employees that the plant was to remain open. He declined to call these misrepresentations "lies" but rather characterized it as simply "doing business."

Connor did not rebut testimony of Gaddy and Alford that he became irate over the timing of the decisions which, in fact, was

contrary to what had been told him would be necessary to smoothly accommodate the needs of Connor's cultivated clientele at Little Rock. Daniel Gray, a former employee at UDC and coworker with Connor at Harvard at the time of Connor's testimony, testified that Connor told him about a meeting with Gaddy and Alford in Fayetteville which so enraged him that he wanted to "quit" right there and then but that he later calmed down. More of Respondent witness Gray's testimony will be discussed hereafter.

Connor testified that at the December 15, 1988 closure notice meeting, he was told that maybe the Little Rock employees could transfer to Malvern without testing, but on December 17, Alford told Connor in a meeting in Little Rock, including Dale Kindy, that the Little Rock employees will have to be tested because eventually the matter would have to go to court. Only Kindy's testimony can be construed as a possible denial of this conversation.

Respondent witness Kindy testified that in December 1988, he attended a meeting with Connor wherein Connor told him that the Little Rock plant was to be closed and that any Little Rock employee who wanted to transfer to Malvern had to be tested because the Malvern employees had been subjected to testing, but there was no reference to the purpose of "avoiding a lawsuit." Kindy had no recollection of what else was said except that he and Connor hoped that a good part of the Little Rock employees would be transferred and that Connor felt responsible for them and also felt responsible to the Little Rock customers. Kindy testified at first that he was never present but later admitted that he attended so many meetings and discussions at the time that Alford might have been "in and out" and "probably" was present. Kindy denied hearing at any meeting any reference to the Union or to testing for the purpose of avoiding the Union or any reference to a possible court case. His demeanor, as was his shifting recollection, was marked by uncertainty and hesitancy.

Connor testified that he contacted Nowak, who assigned Watson to set up testing procedures at Little Rock. A meeting with Little Rock employees was held on December 22, and testing was announced. At the time, there were about 50 Little Rock employees. Of about 40 to 45 who took the test, 40 percent failed the written test and manual dexterity test (16 are alleged as discriminatees). Connor testified that Kindy and Watson worked together and Kindy was advised daily of the names of applicants who passed the tests. Connor testified that at one point Kindy became concerned because morale was being affected among employees who had not been notified of their eligibility to take the physical exam.

Connor testified that Dale Kindy was shocked that his own brother did so poorly on the first part of the tests. Accordingly, he testified a meeting was held with himself, Nowak, Watson, and Kindy at 6 or 7 p.m. in early January 1989 in Malvern to discuss the entire testing procedure. The topic discussed was the number of Little Rock employees who had failed the testing and how close they were to the cutoff scores. According to Connor, Nowak stated that three or four Little Rock employees were just under the cutoff point. A discussion ensued about lowering the cutoff because of the inadequate number of Little Rock employees being hired at Malvern. According to Connor, Nowak stated that he could not lower the cutoff score more because that would mean that Don Pilcher, the Union's president, would be hired. The discussion then turned to the possibility of hiring certain Little Rock employees as custodians who need not be tested.

Kindy denied having been at any meeting where there was any reference to Don Pilcher. However Kindy did testify to being present at meetings in Malvern with Watson, Nowak and Connor, as asked for by Connor, to discuss the number of Little Rock employees who were eligible to transfer to Malvern, and that Watson did produce a list of names of eligible employees and those who failed, which they perused, and that there was a

discussion of the cutoff scores. Kindy corroborated other elements of the discussion testified to by Connor. Kindy also admitted that he argued that Little Rock had good employees who should be hired despite flunking the tests. Kindy admitted that he was particularly concerned that Joe Conick, a valued leadman, had failed the tests and that Nowak suggested Conick could be hired as a custodian without a test. Kindy admitted that he complained at the meeting about other qualified employees who had failed.

Watson and Nowak denied certain references to Pilcher which clearly related to another incident, which we will encounter in the testimony of Key, relating to adjustment of cutoff scores. Neither explicitly denied the Malvern meeting arranged at the request of and with Connor. Nowak testified that he had maintained a "business" relationship with Pilcher and had had no personal animosity toward him. I find Connor's testimony to be more certain and convincing that Kindy who, in large part, corroborated him. I do not find the testimony effectively contradicted.

Another incident argued by the General Counsel to be direct evidence of motivation in the testimony of Connor involves an airplane ride in one of the two small commuter craft owned by PI or Pace and used for visitations to customers. There is no dispute that Connor, Key, and Alford engaged in a conversation in such aircraft on the way to visit a client, wherein reference was made to the hiring procedures at Malvern.

Connor testified that on some occasions, Scott Bull was present on similar airplane excursions, but he could not recall whether Bull was also present on this occasion. Key described them as being alone, i.e., Key and Alford side by side in the passenger compartment and Connor facing them directly across. Connor insisted that all conversations with Alford concerning the Malvern hiring procedures occurred during the first month of operation or earlier. Connor testified that he believed that this

trip occurred in October 1988, and he was about to refer to another trip when he was interrupted by counsel. Key testified that there were several other such business air trips. Connor described the destination as a Little Rock plant customer, i.e., Stemco, located in Longview Texas, a customer cultivated by Connor and Key.

Key testified that the destination was either Stemco in Texas or another customer, Widelite. She vacillated in fixing a date, at first placing it as some date between January and March at a time when there were problems meeting promised delivery dates to Nibco, the Malvern plant's largest proprietary customer. In cross-examination, she placed it as sometime in Febuary. Alford testified that his only "recollection" of being on such airplane ride alone with Connor and Key was on January 10, 1989, on a flight to Nacogdoches, Texas, to visit Nibco, the purpose of which was for Connor and Key to introduce Alford to one of the Malvern plant's largest customers. A flight log was produced for that date, but it is only Alford's recollection that establishes that it is the only date when all three flew alone.

Alford testified in conclusionary terms that the trip postdated the decision to close the Little Rock plant because Connor and Key expressed resentment of having to become marketing people depending on the performance of Nowak and Watson to satisfy their customers.

Connor testified:

> We were going to -- I say we. It was Jim Alford, Debbie Key and I. We went down to Longview, Texas one day to visit Stemco, a customer down there. And during that trip, Debbie Key asked Alford if he -- how the hiring was going at Malvern, that she was also concerned from a customer standpoint. "Are we going to make all our commitments and deliveries?" He went on to explain to her that Mike Nowak had convinced him that this was the way to go. He'd

told him that he could shut this plant down for about a week and in a week's time, he could have it up and running again. that he had not got it up as fast as they thought they would, but overall he thought he'd done a good job getting the plant up and operating again with basically new employees. But, the hiring procedure would remain the same, that they were too far into it now to back out and change their mind. He also went on to explain that Jim Keenan and Bob Gaddy shared the same concerns that she did, that possibly we could jeopardize the deliveries to our customers and that they weren't necessarily in favor of this, that Mike Nowak had convinced him that this was the thing to do and that they were too far into it now to back out and they were going to continue with these procedures.

Key testified:

> Again, we were going to Texas to -- I'm not sure if it was Stemco or Widelite. I didn't remember for sure which customers at the time I gave the affidavit. However, I know we were going to one or the other located in Texas. We were in one of the smaller planes and Jim and I were sitting in the back of the plane, side by side together. And because I had had some customers calling, specifically Hi-Tek, and they had not gotten orders on time, I was concerned about how many employees they had gotten into the Malvern facility. So, I asked Jim how things were going at the Malvern plant, and he said, "Pretty well, I think, or at least they'd better be," because Jim Keenan was opposed to doing anything that would disrupt production or create problems with our customers, and that Mike Nowak had talked Keenan and Gaddy into getting rid of the union.

In cross-examination, Connor testified that Alford did not use the phraseology, "getting rid of the Union," but rather referred to the "hiring procedures." Curiously, Respondent had Connor confirm his 1989 affidavit testimony which, unlike his direct

examination, quoted Alford as explicitly stating in that conversation a discriminatory motivation, i.e.:

> What I recall is Alford saying was that Nowak convinced Alford about the hiring procedure that they had to keep the number of the former employees under 50 percent *so the Union would not have to be recognized.*

In her cross-examination, Key was insistent that Alford's phraseology was that Nowak had talked him into "getting rid of the Union," and not "using the hiring procedure to keep the Union out."

In cross-examination, Key insisted that she asked Alford how "things were going with the Union" at the Malvern plant, and not how things were going in the hiring process at Malvern. This is inconsistent with her own direct examination as well as Connor's trial testimony and his affidavit testimony. Connor's affidavit testimony as to how she phrased her inquiry to Alford was read to Key, but she insisted that her cross-examination recollection was accurate. She admitted that in none of the three affidavits that she had submitted in the investigation of this case did she refer to any "Stemco airplane ride in relation to a conversation with Alford, Connor and the question of the Union, or operations at Malvern." The affidavit was not proffered into evidence.

Alford testified that after Connor and Key engaged in unspecified disparaging remarks about Nowak and Watson regarding their lack of sensitivity and responsiveness to customer needs, Key reiterated a complaint she had began raising in December, which he testified was "basically" that her customers were calling about the Malvern plant's failure to meet its delivery commitments, and that Respondent would be in jeopardy of losing those customers. Alford characterized such complaint as "the sky is falling." Alford's rambling narrative characterization of his response to her appears to be that he told her that it was true that a "few shipments" were late, but that PI was "under pres-

sure," and she had to "bear with us" and be inconvenienced "for a month or two." Alford's testimony does not clearly distinguish what he said to Key in response to her earlier similar complaint and what he said to her on the airplane. He admittedly became angry with her complaints about the closure of the Little Rock plant and her accusations that the PI management "don't care anything at all about the customer. Blah, blah, blah." Alford admitted having come to an intense dislike for Key premised on these complaints and other alleged "disruptive" conduct.

Alford testified that although angry with Key, he attempted to assuage her by impressing on her the "pressures that Mike Nowak and David Watson and all the people in Malvern are under today" and promising that the "problems" will work out. Alford also testified:

> Well, when I was explaining to her why if there were shipments late and why there were shipments late, essentially what I told her was, "They're having trouble hiring people, hourly workers, at as rapid a pace as Mike Nowak thought they would be able to." I said, "We decided to have this hiring process." Gaddy and Keenan were nervous about it from the first minute because they were--I was trying to say, you know, "You're saying Pace is not concerned about customer service. Let me direct your attention to the two highest officials. They are very concerned about customer attention." They were concerned about instituting the hiring processes that Nowak and I decided to institute because they were afraid it would leave the plant down and not operating too long of a period. "So, they share your concerns, Debbie. If you're questioning the validity of our concern for good customer service, you're wrong because Gaddy and Keenan also were concerned. Mike Nowak had estimated he could go through this hiring process and get workers rehired and get back into production within one week. However, the 100 or 200 people we

> thought would apply didn't show up. 640 people showed up. The people that we thought would pass these tests, you know, at a goodly rate, flunked these tests at a goodly rate. However, we've started this process and we're sticking to it. We're not going to change horses in the middle of the stream. It is going to delay our getting that plant back up to the level of production we would have desired by late December or early January, but we're not going off the course. We're sticking with it. They will get that work force in place. They will begin making shipments."

Alford denied that he made any reference to "any attempt or plan to get rid of the Union" or to frustrate the hiring of UDC employees.

Key testified without contradiction to a detailed enumeration of customer complaints of late deliveries caused by understaffing at the Malvern plant. She testified that she did persist in making such complaints until a point in time when she concluded that PI managers did not care about those complaints.

Alford testified without contradiction to a series of confrontations with Connor which commenced from a mid-January realization that Little Rock losses were influenced by factors other than low sales volume. Alford concluded that Connor had been soliciting business based on costs which were not accurately calculated in an inordinately low bid. He confronted Connor on that, as well as on a continuing scrap problem which was exacerbated by the apparent theft of a high amount of aluminum ingots. Alford testified without contradiction that in late January, he confronted Connor about an unacceptable situation regarding Little Rock customer, Delta. Alford testified he had ordered Connor to obtain a repricing of the Delta work. Alford testified that by mid-February, the problem was not corrected and that, when listening to Connor's weak explanations of nonaction, Alford said to himself "why do I need this man?" On March 13, Connor and Key were terminated because of "differ-

ences in business philosophy." They executed agreements which limited their communications with other entities, i.e., customers and employees, and in return were granted severance pay of about 90 days.

Despite Key's admission of a romantic relationship with Connor, at one point they intended to marry, and despite unrebutted evidence of a close business relationship between the two of them in running the Little Rock plant, Key failed to testify that Connor confided in her his early conversations with Alford, Nowak, and Gaddy regarding the hiring process. She testified, however, that Connor expressed to her in "discussions" his belief that the Malvern hiring process was instituted to avoid recognition and bargaining with the Union. She testified that the "whole staff" similarly made such comments. She named only Little Rock Warehouse Manager John L. Crangle and Little Rock Quality Assurance Manager Joseph L. Honeycutt. Key testified in cross-examination that she did not hear Connor raise the subject of the Union at any "staff meeting," and disagreed with any testimony that he "always" initiated conversations regarding the Union. However, Connor explicitly only referred to one staff meeting, i.e., at Harrison when Key was not present.

In direct examination, Key testified that after she transferred to the Malvern plant, she attended "sacred Tuesday meetings" there which were conducted by Alford and attended by Honeycutt; Gifford Green; Malvern plant material control manager, Crangle; Nowak; Bull; Thigpen, Charles Boykin, Little Rock plant quality control manager; and Connor. (Honeycutt was also terminated on March 13, 1989.) She testified to an incident which she says occurred at the "last two meetings," prior to her termination. I conclude that she meant it as one incident at one of those two meetings. She testified that at one point she was inattentive and considering another business matter when she was suddenly aware of Alford and Nowak both jumping up and loudly proclaiming, "we're not to say we're getting rid of the Union. I

didn't say that. None of us said that. If anyone ever says [that] we will deny it." She does not know to whom they had addressed these denials because she was not listening to whoever was speaking. Clearly, this could very well have been Connor, if it occurred or it occurred on that date. This is the only extent to which Connor is corroborated. No other present or former employee or manager of UDC or PI was called on to corroborate Connor or to give evidence of direct unlawful motivation.

Connor and Key also testified with respect to the union animus of the UDC management that had been reinstated by PI and whom PI allegedly involved in the decision to institute a hiring process and whom it clearly involved in the formulation of, administration of, and scoring of the screening and testing process for Malvern plant hourly rated positions. Testimony of Connor and Key most particularly concerns Nowak.

Connor testified that after he assumed authority over the Little Rock plant in 1986, he participated in regularly scheduled meetings with Zachery and Nowak. He testified that at one such meeting in 1986, Zachery stated that his "number one mistake" in purchasing UDC was in not getting rid of the Union at Malvern. Nowak thereupon agreed with him and stated that such failure had definitely been a mistake and that union representation at Malvern was "very costly" and that it caused "many headaches." Nowak did not contradict this testimony, either specifically or generally, except to testify in a conclusionary fashion that UDC's relationship with the Union had been good.

Key testified that in late 1986 or early 1987 she encountered Nowak on one of his periodic visits to the Little Rock plant to discuss some tooling done by that plant for Malvern. She walked up to Nowak as he stood observing the juxtaposition of trim presses to the die casting machines, something that had not been arranged at Malvern until after PI's assumption of the operations. Key testified that she asked Nowak how he was doing, etc.,

and Nowak told her, while staring at the machines, "that was something he always wanted to do." Key testified that he stated "but you couldn't because of the Union," to which Nowak answered "right." Respondent argues that this testimony is not credible because UDC had a management-right's clause in the collective-bargaining agreement which had reserved it the right to control manufacturing processes. However, Nowak did not deny this conversation nor did he testify that it was his perception that he had such right regarding machine location. There is uncontradicted evidence that grievances had been filed against UDC with respect to movement of employees within the plant. It is not clear whether any of these grievances may or may not have related to employment movement caused by machinery movement.

Key testified that on an unspecified date after the PI purchase, but before her transfer to Malvern, she had occasion to visit the Malvern facility, which she did regularly, which was close to her residence. She testified that she came on Nowak and Watson and walked up to them in Watson's office as Nowak was looking down at a piece of paper with a listing of names on Watson's desk. She claimed that she heard Nowak ask, "what if I went down to [a certain number]?" and she heard Watson state, "no, if you do that you'll get Don Pilcher." She testified Nowak then stated, "you're right I don't want to do that. Forget that. No way." When admonished to testify not what Nowak felt about Pilcher but specifically what did Nowak say about Pilcher, she answered:

> Well, on more than one occasion I had heard Mike [Nowak] say that he hated him. He did not like Don Pilcher, or what he represented with the Union.

Key testified to one occasion in September 1988 when she came on Nowak as he crouched down in one office eavesdropping while Pilcher was across in another office talking to Kratz. Key testified that Nowak stated, "I hate that little sonofabitch."

Nowak testified that he held no grudge toward Pilcher, that he never called him a S.O.B. and that he did not hate him. Accordingly, if Nowak prevented Pilcher's hiring by PI, it was due to some motivation other than a personality conflict. Nowak testified that he did not convince Alford to utilize a testing process to get rid of the Union nor did he make statements to anyone to that effect. The balance of his testimony does not give his version of the foregoing conversations alleged to have occurred between himself and Key or Connor. Instead, Respondent's counsel elicited from him what were presumably intended to be categorical denials. However, the following type of testimony was adduced. I cautioned the witness as to the distinction between clearly denying that an incident occurred and not remembering or not recalling whether it occurred. Nowak testified, when Respondent's counsel alluded to testimony of Connor regarding Connor's reference to a plan to avoid union representation, "I don't remember." He testified that he was "aware" of no such plan. In a series of questions by his counsel which alluded to testimony of Connor or Key, Nowak was asked whether he "accepted" or "agreed" with the testimony synopsized in Respondent counsel's questions. Thus Nowak "rejected" Connor's testimony regarding those daily conversations about the hiring ratio and the Union, and he "disagreed" with testimony referencing his statements to the effect he convinced Alford to use the testing process to avoid union representation (i.e., whether such statements were made whether true or not). He did not "agree" with testimony to the effect that he told Connor "the less you know the better," and he did not "recall" saying anything like that. He "rejected" the testimony of Key regarding her testimony concerning Watson's suggesting that scores ought not be lowered to avoid the hiring of Pilcher. However, when referred to "sacred Tuesday meetings," he did deny that the subject of ousting the Union ever arose at a "production meeting."

The above recital of purported denials by Nowak was rendered by a witness whose demeanor drastically changed. In mid-September 1990, as an adverse witness cross-examined under Federal Rule 611(c), Nowak was overtly assertive and answered his cross-examiners in a near contemptuous countenance and tone of voice. When he testified on July 23, 1991, he was no longer in charge of Malvern plant, having been transferred to another Pace facility. His demeanor was passive. He answered direct examination questions in a tentative, uncertain, unemphatic tone of voice and physical mannerism. His lack of assurance and lack of certitude was most pronounced when the so-called denials were elicited. Hearing him testify, one had no sense that he was in any way denying that certain relevant conversations did occur between himself or Key. Clearly "rejecting" or "accepting" posed cryptic characterizations of the General Counsel witnesses testimony hardly deserves to be dignified with the characterization of "categorical denial." Neither Nowak nor Respondent's counsel was ignorant of the importance and significance of his testimony. Neither he nor they were inexperienced in these matters, particularly at this stage of litigation, I cannot presume that the way these questions were put and answered were necessarily the result of careless phraseology. Completely unanswered by Nowak's anemic denials is in what manner or in what degree or in what particular whatsoever he "disagrees" with or "rejects" those posed questions. Certainly, Nowak, as a 611(c) witness, was astute and cautious almost to the point of contentiousness when pursued by counsels for the General Counsel and the Charging Party in cross-examination. Much like Gaddy and Alford, Nowak failed to provide an explanatory, exculpatory version of the context of conversations I must now find are not effectively denied.

The Respondent argues that Connor and Key are not credible witnesses because they were vengefully biased, mutual inconsistent, and/or contradictory and contradicted by the unrebutted testimony of third party, unbiased witnesses as to certain collat-

eral matters, the most significant of which is Connor's own bitterness and animosity toward Respondent.

Connor's less than lucid direct examination testimony, delineated above, reveals internal inconsistencies. Some of these inconsistencies are significant, e.g., at first he testified that in his first accusatory conversation, Alford had not denied the unlawful motivation. In later cross-examination, he conceded that Alford, Gaddy, and Nowak did, in fact, make an explicit denial. However, the rather loose language elicited by counsel does make it arguable that when Connor said Alford had not denied the accusation, he meant the first accusatory conversation. Yet, it remained for cross-examination to establish that there had been a denial at all.

Connor's testimony at trial also varies from his affidavit testimony, e.g., in the airplane conversation Connor's affidavit testimony sets forth an explicit statement of unlawful objective not testified to in his trial testimony. Strangely, the affidavit testimony is closer to Key's version of the airplane conversation. It could be argued that after a lapse of time in her mind's eye, she recalled the meaning of what was said but not the specific form of what was said, rather than what was actually stated, i.e., applicant screening was instituted to avoid hiring a majority of UDC employees, the stated or unstated ultimate objective of course is "to get rid of the Union." However, both Connor and Key were adamant as to their own inconsistent, but not necessarily inherently contradictory versions.

Although Respondent makes much of the fact that Key and Connor did meet socially on one occasion about 4 weeks prior to the trial, it is pure speculation that they rehearsed a contrived testimony, as is argued in the brief. Neither witness appeared particularly dim-witted. Rather, as persons versed in the art of persuasion, i.e., sales and marketing, if they had collaborated, a much more consistent and mutually corroborated effort would have resulted. Indeed, Key forcefully resisted Respondent

counsel's effort to have her do so by reading to her Connor's affidavit. The very inconsistencies in testimony counteract the notion of contrived collaboration. Yet those inconsistencies plague both their testimony, not only as to what particular words were said but when they were said.

Connor placed all critical conversations within the first month and particularly the first 3 weeks of PI's operation. This makes more sense than Key's reference to February 1989. The later in time, the less likely Connor or Key would have been included in Respondent's confidence. I discredit Alford's testimony that PI intended Connor's employment to be temporary. It is contrary to its objective treatment of and statements to him prior to the immediate closure decision and prior to those incidents which presumably soured Alford on Connor's acceptability, i.e., the vociferous objection to immediate Little Rock closure, and Connor and Key's perceived Little Rock customer ill treatment, the underbidding problem which came to a head in the Delta incident, and the scrap situation culminating in the missing ingots incident. Prior to that, Connor was made a vice president, given a raise and was perceived by Alford to be a perfect complement to himself, an accountant ignorant of aluminum die casting technical expertise. With respect to Alford's reference to the aircraft ride of January, we have only his testimonial "recollection" that it was the only time that the three of them were alone on an air trip to a customer. Indeed, Connor was not even certain that Bull, who sometimes flew with them, was not present. Moreover, Alford's testimony seems to speak prospectively of "early January" as a target date promised Key for the settling of the hiring process, whereas he places the airplane ride on January 10, a date by which hiring had pretty well approached 70 employees. I credit Connor's time reference as the most accurate.

Despite the inherent problems in Key's testimony, particularly as to with that of Connor and what Respondent argues are

the absurdities and improbabilities of her testimony with respect to statements of Nowak, the latter failed to clearly and effectively contradict her, as he similarly failed to contradict Connor.

The most troublesome aspect of Connor's credibility arises from the issue of bias. Connor insisted at trial that he harbored no bitterness nor resentment against Respondent at the time of trial despite that fact that he admittedly felt that he had been manipulated and duped by Respondent's false promises, that he had been used by PI to obtain customers he had cultivated for UDC and then cast aside and fired for the first time in his life. Connor's own description of his reaction to being terminated ranged from being stoically expectant to that of being "kind of" crushed and humiliated.

He testified that he had been in no direct competition with Nowak despite the fact that, as he admitted, there were times that the Little Rock plant had been desperate for any kind of work and, as Key testified, there had, in fact, been an overlapping of customers whom Zachery could have assigned to either plant. Connor himself admitted that it made sense that one of the two plants had to close. Yet, he testified that he was indifferent as to which plant Zachery assigned overlapping die casting jobs.

Connor was cross-examined as to what persons he considered to be a "confidant" or a "trusted friend" at Little Rock. He did not refer to Key. She, however, admitted they had made plans to marry in June or July 1989 and had dated prior thereto. Connor at the time had separated from his wife and had custody of an about-to-be married daughter. Key had been twice married. It is not clear and, in any event, irrelevant what the status of her second marriage was at the time involved here, i.e., married, divorced, married but separated, open marriage, etc. Respondent's judgmental accusations of scandalous and immoral behavior are purely speculative and irrelevant. It is sufficient to find that they maintained a romantic commitment to one and another. Although Connor was silent as to his relationship with Key, he was

not specifically asked about it. His testimony, however, suggests that she was not a business confidant.

I accept Respondent's argument that Connor was biased against Respondent and that Key was motivated to have been biased. I must do so because of the testimony of numerous witnesses, many of whom have no current connection with Respondent. I recognize the General Counsel's argument that some of those witnesses clearly evidenced a personal dislike of Connor and/or Key or, in some cases, a moral disapproval of them because of their personal relationship. However, the General Counsel did not seek to rebut that testimony, which is not of sufficient internal incredibility that I must accept the essential truth of it, some of which I suspect was exaggerated.

According to unrebutted and therefore credited testimony, Connor and Key were closely allied personally and professionally in the operation of the Little Rock plant. They were both intensely committed to survival and success of that plant. Indeed, when Connor assumed control over the Little Rock plant, he "wiped out" the entire work force and new employees. Under Zachery and PI's ownership, Connor and Key both forcefully defended the interests of customers they had personally cultivated, even to the annoyance and alienation of Alford. Indeed, Thigpen admitted that Connor tended to be a straightforward person who, without guile and with internal political ineptness, emotionally spoke his mind and stated his position in such abrupt manner to his supervisors and to his peers that, according to Thigpen, Connor literally committed "corporate suicide" while employed by PI.

The most damaging testimony came from a former associate of Connor's, both at UDC and at Harvard, Daniel Gray, the former UDC quality control manager. It is Gray's unrebutted testimony that he and Connor were both employed at Harvard at about the time of Connor's testimony. Gray testified that he recommended Connor's employment at Harvard. Indeed, Connor

was hired by Harvard on June 1, 1989, in the responsible position of operations manager, to which was later added the duties of acting division manager. Connor had applied for a position there on May 1989. Respondent adduced into evidence his written application which, arguably, did not explicitly identify his immediate past employers as PI. However, Connor's testimony that he did so in the interview process was not disproved. In any event, surely Gray, who recommended Connor and who is argued by Respondent to be a person of certain morally upright credentials, would not have lied for Connor. In any event, Gray testified to certain conversations with Connor at the time both were employed at Harvard.

According to Gray, he had numerous conversations at Harvard with Connor who stated that he was bitter with PI with respect to the way they terminated their relationship. Connor told Gray that no matter how long it took him, he would "get back at them," even it if "took him to the end of his life." However, Connor neither referred to the instant case, presumably pending at the time of those conversations, nor to an alleged unlawful Malvern hiring procedure.

Gray, a religious missionary student, admitted that de had unsuccessfully tried to dissuade Connor from his relationship with Key, which he morally condemned, and which partially motivated his quitting his job at UDC in April 1988 which he had held since 1983.

Although I must accept Gray's testimony, I have some problems with it. Why did Connor not refer to his cooperation with the prosecution of this case if he had been so intimate with Gray? Why did he not refer to it as the means for his retribution? Gray also testified that Connor referred to the emotional confrontations with Gaddy and Alford in Fayetteville and that Connor told him he ought to have quit "there and then." Why would Connor have contemplated quitting if he were so committed to holding

onto his job to the extent that he became permanently embittered?

In fact, the Respondent adduced into evidence the fact that Connor had even applied for the plant manager's job at the Harvard Ripley plant way back in May 1988. Why would he have done so if he had been so perversely committed to staying at the Little Rock plant and remaining in proximity to Key? Why would Connor also have been allegedly so embittered by being forced by Gaddy to move to Fayetteville away from Key who was moved to Malvern when he already had attempted to get a job in Ripley, Tennessee, in May 1988 and did so again in May 1989 and considered quitting during the Fayetteville 1989 confrontation? Respondent's own documentary evidence of the 1988 job application tends to add credence to Connor's testimony that he anticipated his own termination by at least 1 month by contacting a "headhunter" employment agency. Such intent could explain his "careless" disregard of the sensitivities of his superiors and his headstrong position regarding former Little Rock customers. It is, however, inconsistent with testimony of other Respondent witnesses as to his bitterness caused by being forced out of his job and away from Key.

Gray was self-described as a friend of Connor who, himself, did not identify Gray as a "trusted friend." Respondent argues that it is significant that Connor did not confide in Gray his conversations with PI officers regarding the unlawful hiring scheme as he also did not confide fully with Key. Yet, Connor did not speak to Gray about his involvement in this proceeding. Two other Respondent witnesses, also associated with Harvard, who were not even self-described as close friends, testified that Connor spoke openly about his trial participation. One such witness, Rob Ennis, the personnel manager at Harvard, testified that Connor bragged about his status as the "star witness." Harvard's manager of engineering, however, testified that Connor joked about his trial participation before the Board.

In absence of rebuttal, I cannot discredit Gray. His highly mannered demeanor was not as convincing as Respondent argues in the brief. He did not, as Respondent asserts, spout tears of anguish. Rather, he appeared to have undergone sudden great tension when referring to the bitterness conversations. Otherwise, he was quite fluent. I cannot discredit him. I must conclude that Connor was to some degree embittered against the Respondent; if not for his termination, at least for the manner of it and for being deceived and used, as so admitted by Alford and Gaddy. However, I do not believe that the depth of that bitterness is as pervasive as Respondent argues, as the evidence discloses that Connor was ready to leave UDC and the State of Arkansas, and presumably Key, in May 1988 and was prepared to relocate in Tennessee again away from Key in May 1989 after his termination and had considered it in the January 1989 Fayetteville confrontation.

Respondent argues that Key is biased because she, too, was terminated for the first time in her career and separated from her obsession with her duties at UDC and with Connor. Respondent's characterization, in the brief, of her compulsion with her job is grossly exaggerated as it was with respect to Connor's attitude to his job. Thus Respondent witness Karen Carruth, a former UDC associate like the Harvard managers, testified disparagingly of Key and Connor's business tactics while she was employed at UDC. However, when counsel attempted to lead her into testifying as to an extreme obsession, she resisted and characterized Connor's and Key's professional attitude as one of commitment and hard work. Similarly, Respondent witness Kindy declined to be led down that same path, and he characterized Connor as having had much the same balanced and reasonable attitude to the Little Rock operation and same reactions of disappointment to its role to PI as Kindy did himself. Kindy, moreover, testified that Connor was committed to SPC and quality control, whereas another Respondent witness testified

that Connor disparaged quality control while employed at Harvard.

Respondent argues that Key was enraged and embittered because of the disruption which PI caused in her personal relationship with Connor. In view of Connor's readiness to leave UDC in 1988 and readiness to relocate to Tennessee in 1988 and 1989, questions arise as to the depth of this so-called obsessive relationship. Indeed, much of Respondent's arguments are based on inferences, speculations, and psychoanalytical guesswork. No witness or independent evidence was presented as to Key's alleged postdischarge, persisting bitterness despite the fact that Alford admitted spending $ 6000 in private investigation of both Key and Connor in preparation of PI's defense. Indeed, Key testified that she and Connor ceased dating in August 1989 and she had not met with Connor in over a year except for the pretrial luncheon meeting. It is pure speculation as to whether PI was responsible for their failure to marry as planned in the summer of 1989. It is true that Key did not obtain employment for a long period after her termination, but it was not established whether she had no options or opportunities for employment or whether she simply did not seek employment while enjoying 90 days of severance pay.

Respondent argues that Key and Connor were biased against Nowak because of a bitterness between Connor and Key and Nowak prior to her termination. Although there is sufficient unrebutted evidence that, indeed, there was a competition between Connor and Nowak and between the two plants, there is also ameliorating testimony. Thus Kindy again resisted being led to an exaggeration of such conflicts by explaining that Key sincerely believed Nowak was not servicing her customers with sufficient expedition, and that gave rise to confrontations and "tension" between Connor and Key and Nowak.

Thigpen at first testified to a personality clash between Connor and Nowak of "epic proportions," but later he explained that

Connor's reaction was inevitable and understandable, given the situation Connor was confronted with, i.e., being forced into a "mode of disagreeing on production" with respect to parts he had been producing for a long period of time which were now produced by Nowak who, in turn, exhibited a demeaning attitude toward Connor despite Connor's past experience.

Although Alford referred to mutual back-stabbing and mutual disparagement between Connor and Nowak, the latter's testimony is silent as to this supposed pervasive acrimony.

Respondent adduced unrebutted testimony, which it argues reveals that Connor and Key resorted to deception and sleazy use of alcohol and sex in the business interests of the Little Rock plant. Such evidence, insofar as it bears on the credibility of those witnesses, is offset by Alford's admissions that he and Gaddy have engaged in deception in the business interests of PI and he, Alford, would continue to do so if needed. Indeed, the outstanding example of that is Alford and Gaddy's admitted misrepresentation to Connor, including Alford's very first explanation as to the motivation of the purpose of the screening process at Malvern.

Respondent argues that an inference of bias must be raised from the fact that Key communicated with Pilcher by telephoning him at his home after her discharge and was referred by him to the union attorney. It is unnecessary for me to resolve the issue raised in Respondent's brief of the date of one of her affidavits, which the General Counsel argues is the third with a preprinted erroneous date of 1988 instead of 1989, which would place it well in advance of the filing of the unfair labor practice charge. The affidavit itself was not adduced into evidence.

With respect to Connor, he did not initiate contact but rather responded to inquiries of the Board investigation. Connor gave his first affidavit and cooperated with the Board agent long before he had been hired by Harvard, and thus it is unnecessary

to resolve the issue of whether Harvard is a competitor of PI which might be aided by the finding of backpay liability owed by PI.

It is uncontradicted that 2 months after Connor executed his first affidavit for the Board on April 26, 1989, Connor, while employed at Harvard, responded to Alford's request of him to assist PI in a matter dealing with PI's customer, Ford Motor Co. Connor did so by drafting and sending a letter to Ford on June 24, 1989, as requested by Alford in furtherance of PI's business relationship with Ford, a valued customer.

Furthermore, Connor was receptive to PI counsel's request of him to meet and discuss the facts to be litigated in this proceeding prior to trial and agreed to a meeting. Because of a family illness, Connor had to cancel the meeting. He was not asked to schedule another meeting. Connor's postdischarge cooperation with PI undermines Alford's description of the alleged bitterness that led up to it. If Alford, who hated Connor so much, is to be believed, how on earth could PI have asked for or even expected Connor's cooperation?

Connor's cooperation with PI, while employed by its alleged competitor, was not required by the severance agreement. That conduct reinforced by conclusion that although evidence of bias cannot be discredited, it is exaggerated to some extent and mitigated. Perhaps Connor did, in fact, experience a mixed reaction to his discharge. From one viewpoint, it was a personal defeat and embarrassment effectuated, as perceived by him, in a duplicitous manner. From another aspect, he, like Key, received 90 days of severance pay which, in part, compensated for the unnecessary expense of the cost of renting a Fayetteville residence for an unspecified time, and he was able to relocate at Harvard industry in a responsible position, where he had sought employment even prior to PI's ownership. From one standpoint, his expressed bitterness is believable; from the other, his

postdischarge cooperation is logical. Perhaps the answer is that Connor actually was himself as ambivalent in his introspective reaction as his testimonial self-description suggests. Thigpen's testimony may very well have unwittingly revealed that to be the case. Thigpen was a witness who revelled in the testimonial spotlight and who would not resist launching into arrestingly descriptive, gratuitous monologues. As noted above, he observed Connor to be a technically competent person of some experience and self-pride who lacked the finesse and guile for corporate survival. Instead, Connor bluntly and very emotionally reacted to business situations and, according to Thigpen, he let his mouth do his thinking for him and spoke out what he perceived was the bald truth, thereby antagonizing persons to his own disadvantage. Thus Connor may very well have reacted to his termination by PI at times rationally and stoically, but at others with bitterness and resentment. His persistent open accusations of unlawful motivation are also in accord with Thigpen's analysis.

The demeanor of both Connor and Key is not such as to necessarily cause disbelief. Rather, the opposite is the case. Despite her lapse into disjunctive responses, Key, like Connor, gave every evidence of a dispassionate, even-tempered cooperativeness, even in a persistent cross-examination. Neither gave the slightest evidence of animosity or bitterness. Connor was the more certain in demeanor. Key answered in the disjunctive at times and became admittedly confused when cross-examined as to what Connor had stated to her regarding PI's Malvern hiring procedures during their employ by PI. I find Connor more accurate as to the dates. Moreover, the substance of his testimony more closely resembles Alford's with respect to the airplane ride. Where their testimony does not agree, I would defer to Connor's recollection except as noted below.

The factor that most seriously undermines Connor's credibility is not that he maintains or did maintain a bias against

Respondent, nor that he even sought to seek vengeance against it. Vengeance may be the factor which motivates the witness into cooperating with the tedious legal process of prosecution of a case against a former employer which, by telling the truth, may jeopardize the possibility of future decent references that might have been made possible by the postdischarge cooperation in the Ford matter. The existence of vengefulness does not necessarily of itself compel rejection of a witness' veracity. The existence of that motivation is offset by the bias of economic motivation which is necessarily pregnant in the testimony of Gaddy, Alford, and Nowak. The possible backpay liability in this matter was perceived by Alford to be several million dollars. Alford has invested $ 1 million with the PI venture, while Gaddy's investment is about 10 times more than that. Nowak was obliged to acquire a small percentage of stock investment in PI and had to obtain a sizeable loan in order to do so. Alford admitted that he would, on the necessary occasion, engage in deception to advance the business course of PI. He insisted that he would "not lie to a federal official under oath."

I find that Connor's bias of vengeance is to some substantial degree offset by the inherent economic bias of Respondent's witnesses which also does not necessarily compel total rejection of their testimony, any more than revenge does of Connor and Key. The most serious problem caused in a credibility resolution by the finding of a revenge motivation is not its existence so much as the fact that Connor flatly denied its existence. Connor's assertion of complete indifference to PI, and other testimony which downplayed his competitiveness and tended to cultivate an exaggerated image of neutrality, is clearly misleading. Connor thus revealed himself as a witness who wanted to be believed rather than one who was completely dispassionate. By not being completely truthful, Connor was severely jeopardized in credibility as well as that of Key which tended, in its stumbling fashion, to roughly corroborate him. However, the credibility of Connor and Key has not been totally ruined. It is enhanced by

the ineffectual and obscure "denials" of Nowak, a witness with the poorest and least convincing demeanor of any witness in the entire proceeding, although others came extremely close.

Connor's credibility is further enhanced by the fact that Alford and Gaddy's own admissions track closely to Connor's recollection. Also, Connor made his accusations of unlawful motivation well prior to his termination as well as prior to the time he lost favor with Alford. These accusations were therefore not something concocted after his discharge. Further, even after his accusations, he was made vice president and given a raise in pay, and was in no way reprimanded for making them. Clearly, he was privy to hiring procedure discussions at a time when Alford considered him to be a perfect, possibly permanent executive complement to himself. Thus Respondent's argument that it was not logical to confide in Connor loses its cogency.

The status of Connor and Key's testimonial credibility, and the interpretation of the so-called admissions of unlawful motivation, cannot be resolved without a counterbalancing evaluation of Respondent's witnesses' testimonial explanation of the motivation for the constitution of screening process at Malvern instead of an automatic retention of a work force already in place for the processing of ongoing orders for the same immediate customers. A necessary prelude to such an evaluation is an analysis of the context, if any, of union animus of PI or the management team which it inherited also enmeshed in the Malvern hiring process.

C. *UDC Union Animus*

The Union had represented the employees at the UDC Malvern plant not only during its ownership by Lew Zachery, but also when the same plant had been owned and operated by the predecessors, Hoover Universal, Hoover Ball and Bearing Company, and Glenvale Products. The Union had negotiated and serviced a continuous series of collective-bargaining agree-

ments, the last of which was, by its terms, effective from May 6, 1986, until May 6, 1989. There is no evidence of a history of bad-faith bargaining by UDC nor of collective-bargaining animus. Indeed, Connor bragged to prospective customers that not 1 day of productivity had ever been lost because of collective bargaining.

It is the General Counsel's position that the 1986 negotiations began a period of deterioration of that cooperative relationship. The difficulty in analyzing the General Counsel's evidence of animus is that much of it is entwined with evidence of an alleged personal animosity between Nowak and Union President Don Pilcher. Clearly, if there had been a motivation to rid the operation of the Malvern plant of the perceived impediment of union recognition and collective bargaining, the evidence does not reveal a universal animosity by UDC or PI against all individuals who, at one time or another, engaged in union activity either by way of grievance filing or by holding the positions of union representatives. Indeed, several past or then-current union representatives had survived the PI hiring process. One of them, Floyd Gregory, was even hired by PI to a nonunit salaried position relating to quality control. That person had actively represented the Union in direct negotiations with Watson in situations of disagreement over proposed work standards devised by Watson where the proposed standard was thereafter modified to accommodate the objections of the Union.

The General Counsel argues that there is some significance to the fact that the 1986 negotiations did not immediately result in contractual agreement and for the first time the employees worked without a contract for a 30-day period, during which the UDC management hired security personnel to secure its premises and during which access by employees was somewhat limited. However, there was no evidence of a confrontation of any kind. Pilcher's testimony as to the less than enthusiastic attitude of the UDC bargaining team is conclusionary and

subjective. Testimony of other witnesses of either side is also subjective, conclusionary, and of little probative value except as evidence of managerial perception. The chief negotiators for the Respondent terminated their employment at UDC well before the negotiations for its sale to PI. There is little to be gained by any elaboration of testimony regarding the 1986 negotiations. Of more significant is evidence of union animus of UDC managers who were hired by PI and incorporated into its hiring process at Malvern.

Subsequent to the negotiation of the 1986 current contract, the Union filed unfair labor practice charges which resulted in the issuance of a complaint by the Regional Director which raised the issue of alleged unilateral changes in collective-bargaining insurance benefits on or about October 1, 1986. Thereafter, a non-Board settlement effectuated a restoration of the status quo. Similarly, in June 1988, UDC unilaterally changed certain insurance benefits by selecting another carrier. A settlement of alleged unfair labor practice charges underlying a complaint effectuated a status quo restoration in December 1988. By virtue of these settlements which were never revoked, no inference can be raised that UDC had actually engaged in unlawful conduct. Those cases are only relevant to demonstrate that the Union actively engaged in enforcing the collective-bargaining contract. There is testimonial evidence that the impact of being frustrated in its unilateral action was of some significance to the attitude toward union representation by UDC managers later hired by PI.

Since 1985, Margaret L. Kratz had attained the position of personnel administrator of the UDC Malvern plant at the time of its sale to PI. She was hired by Alford to continue in that position at PI. She did so until she voluntarily terminated her employment with PI in July 1989. Permission was granted at trial to examine Kratz as a 611(c) witness. She was clearly intimately involved in the PI hiring process, and her testimony revealed her

self-perception to be closely allied with the interests and vindication of PI with whom she closely associated herself in the preparation of her testimony as its own witness and as a 611(c) witness, even to the extent of enacting a pretrial question-and-answer session of expected interrogatories with Respondent counsel. Her demeanor of hostility, manifested in a coldly contemptuous tone and manner toward the counsels for the General Counsel and the Union, shifted to that of geniality coupled with startling responsiveness when examined by Respondent's counsels. Her demeanor, regardless of her nonemployment status with Respondent, clearly marked her as a witness with a manifest pro-Respondent bias.

Kratz characterized the 1986 negotiations a hard bargaining. She and Nowak were members of the UDC bargaining team but subordinate to its chief spokesperson, Bob Williamson. Kratz testified that during these negotiations, UDC perceived itself to be in such financial difficulty that its very viability was in danger and that economic layoffs preceded and followed the negotiations, but she claimed that there was no deterioration of the relationship with the Union. In fact, there is no evidence that UDC made an effort in those negotiations to undermine the status of the Union. Nor is there any evidence of acrimony because of any regressive UDC bargaining stance although Kratz perceived that period as "tough times" when there was a "lot of nervousness and tension" but which was followed by normalcy.

When Kratz was directed to the 1986 unfair labor practice settlement which involved backpay for loss of employee benefits, her perception of Zachery's motivation in making the attempted unilateral changes was that he was trying to effectuate cost-saving measures for a plant that was in a "desperate" financial shape. She further characterized her perception that the actions complained about by the Union and frustrated by the Union were intended "to keep the doors open." She perceived

Zachery's frustrated attempt to unilaterally change the insurance carrier "as a last resort" to save the business. Whether or not her perceptions were accurate is irrelevant. What is relevant is that these were her perceptions. When she gave the testimony, Kratz' recollection of the frustrating conduct of the Union and its impediment to UDC's financial viability was given in a tone and manner which strongly suggested resentment, despite her assertions of normalcy and congeniality in the bargaining relationship. It was particularly so when she described UDC's attempted actions which were frustrated by the 1988 unfair labor practice charge. According to Kratz, the attempted benefits changes came at time of even further aggravated financial losses and "desperate measures for survival." Indeed, there is no dispute that UDC was in desperate financial situation which, in great part, made it an attractive object for purchase, according to Gaddy, at a bargain level price. Given the testimony and her demeanor, it is extremely difficult to believe that Kratz harbored no resentment toward the Union because of its perceived obdurate opposition to those desperate actions.

It is equally difficult to believe Kratz' testimony that she held no resentment toward former UDC employees, hearing her describe her harassment by their nighttime recriminatory and threatening telephone calls during the hiring process.

The Respondent adduced evidence to the effect that during her UDC tenure, Kratz was well liked by the employees and maintained a benevolent, congenial relationship with the employees and with Union President Pilcher. Respondent then adduced evidence that Kratz harbored no preacquisition personal grudge against the Malvern employees and had no personal reason to discriminate against them. Accordingly, if the question arises as to why she may have engaged in some aberrant or seemingly arbitrary conduct in the hiring process, it cannot be because she was an arbitrary or draconian manager. Some other motive must

be inferred. Respondent argues that some of her more questionable hiring decisions were the result of simple human error.

Michael Nowak, hired as vice president of manufacturing for PI, as well as shortly thereafter a stockholder, had been hired in 1983 by Hoover at Malvern as manufacturing manager. He became the UDC Malvern plant manager in 1984. He described the UDC-Union relationship in evasively generalized terms. He claimed there had been no "inordinate" number of grievance activity and virtually no arbitration of grievances but rather grievances were resolved by negotiation. He described his relationship with Pilcher as businesslike and without animosity.

The General Counsel adduced similar generalized but uncontroverted testimony from Pilcher and Marvin Berryhill, a 1986 union committee person, to the effect that there had been grievances filed with respect to employee subcontracting and movement of employees within the plant, which resulted sometimes in the award of backpay. There is insufficient evidence as to whether a judgment can be made as to whether the grievance activity was in fact excessive, or more significantly perceived by Nowak to be such, except the testimony of Connor and Key. Nowak conceded that one of his major objectives as a PI manager, greater cross-training of employees, had been frustrated under UDC by terms of the collective-bargaining agreement. He further conceded that the cross-training issue gave rise to UDC's "major gripe" in the 1986 negotiations. Nowak's union animus must be shown from other evidence than the vague testimony as to the nature and amount of grievance activity itself. Much of that evidence is attended to in the testimony of Connor and Key. Nowak was silent as to his attitude and perception of the Union's effort in frustrating the desperate cost-saving attempts by UDC in 1986 and 1988, but he admitted awareness of that situation. His general description of a benign mutual regard conflicts sharply with Kratz' perception of the union conduct in those 1986 and 1988 efforts to obtain financial viability.

Don Pilcher had been employed by UDC and its predecessors at Malvern for 22 years. He started out as a custodian and ended up in a general maintenance classification at the time of the PI acquisition. Pilcher had been president of the Union since 1979 to 1982 when he took a leave of absence and worked on the staff of the UAW. He was the 1986 bargaining unit chairman. His representational duties involved dealings with Patricia Nader, the UDC personnel director headquartered in the UDC Saline, Michigan plant, as well as Kratz and Nowak. In July 1988, the union bargaining committee consisted of Pilcher, Dexter Hill, Jerry Yarborough, Floyd Gregory, and Marvin Berryhill. In the 1986 negotiations, it was headed by Pilcher and composed of Berryhill, Charline Baker, Verna Parish, and Tom Lackey.

Much of Pilcher's testimony of UDC's post-1986 contract agreement attitude is conclusionary, generalized, and of little probative value. His testimony with respect to a claimed poor relationship with Nowak is particularly confusing. From what I can decipher, it appears that that there was some kind of personality conflict between the two men that caused mutual communication difficulties. Such evidence, of itself, is hardly indicative of a hostility toward a collective-bargaining relationship as such. The General Counsel's compulsion to adduce as much evidence as he can, regardless of its probative value, compounds the difficulty in resolving the issues of this case. Much analytical time is therefore wasted in gleaning out such chaff, not to mention the enormous time wasted in the sheer reading of it in an unnecessarily bloated record. The General Counsel was not alone in this tactic, but it is his prosecution which set the bases for the enormity of the defense.

In the interest of keeping this decision within the realm of sane proportions, I will simply ignore the trivial and ambiguous episodes supposedly indicative of a personal hostility of Nowak toward Pilcher or supposedly evidencing the aggressiveness of the Union or antiuion animus, but which are ambiguous or of remote materiality.

Gaddy testified that he had no aversion to operating a plant whose employees are represented by a union. Alford testified that he was the PI representative mainly involved in negotiating with Zachery for the purchase of UDC's facilities and operations by means of a purchase of all its assets. According to him, Zachery revealed in those negotiations that the Malvern plant employees were represented by the Union and that they had "got along just fine" over the years. However, he also testified that Zachery made many optimistic representations about the financial status and operations of UDC which he, Gaddy, and Keenan carefully scrutinized with a "jaundiced eye," i.e., Zachery wanted to sell the business at the highest possible price and his positive financial representations were skeptically evaluated. Keenan, Gaddy, and Alford made their own independent observation and evaluation of the UDC operation finances and facilities. It is reasonable to assume that they also made some effort to evaluate the relationship of UDC's in-plant management with the Union prior to the sale. Respondent's witnesses are silent on the subject. However, Alford testified that he and his associates independently investigated Zachery's representations by not only an examination of UDC records, but by also interrogating a variety of unnamed persons. Alford testified that he questioned Nowak about the operation and discussed the employees. He is silent as to whether or not he elicited, either before or after the sale, either Nowak, Watson, or Personnel Manager Kratz' perception of the historic collective-bargaining relationship. They also are silent as to whether such conversation occurred. Inasmuch as Alford and Gaddy admitted to lack of experience and knowledge of union representation matters and inasmuch as they concurrently sought labor law advice form legal counsel prior to the sale, it would appear to be most unlikely that these otherwise astute businessmen and accountants had no curiosity as to the state of UDC's bargaining relationship or the nature of the collective-bargaining contract and its cost and/or control impact on the operations of the UDC Malvern plant, which was per-

ceived to be the only profitable plant in the UDC stable but which status was also admittedly perceived by Gaddy and Alford to be precarious, given its product line and market trends. It is most unlikely that they blithely ignored the possible cost factor of a continuation of a bargaining relationship when carefully scrutinizing all other factors. It is hard to accept Gaddy's testimony which indirectly suggests that he was indifferent to whether Malvern was unionized or not. Alford testified that unionization of a plant may or may not affect its "bottom line" profitability depending on the circumstances, but he was silent as to whether he made an analysis of that factor prior to the PI purchase.

Evidence of Keenan, Gaddy, and Alford's attitude toward union representation, regardless of whether it preceded the sale or was caused or influenced by post-UDC management, must be definitively ascertained by resolution of the credibility of Connor and Key and an analysis of circumstance of why the decision was made to reinstate the UDC Malvern employees only after screening and testing, when that decision was made and by whom it was made, and the proffered reasons for making it.

The General Counsel argues that, alternatively, an analysis of that process itself would reveal such an absence of business justification and job relatedness that the trier of fact must necessarily infer unlawful motivation even in the absence of credible, direct evidence of unlawful motivation.

D. *Respondent's Proffered Malvern Hiring Rationale*

1. Introduction

The credibility of Connor and Key is extremely vulnerable because of the numerous weaknesses that have already been discussed. Respondent had the opportunity to rebut their testimony and destroy its effectiveness with a coherent, consistent, convincing testimonial contradiction. Such contradiction necessarily involves a credible explanation of the circumstances that

motivated and implemented a screening process as a condition for the continued employment of the Malvern UDC employees in job functions that were immediately available for them, but which ultimately took 6 to 8 weeks to fill by means of a tedious and expensive screening process. As Thigpen testified, supposedly in jest, a proposed testing procedure must be carefully scrutinized because it is like buying a used car and can be a great mistake. He added that he would rather "take a 1950 Edsel over a testing procedure." There may be more truth than humor in that response.

Instead of successfully availing itself of the opportunity to effectively contradict Connor and Key, the Respondent not only adduced the ineffectual "denials" of the unconvincing Nowak but proceeded to elicit testimony from Gaddy, Alford, and Nowak which is grossly inconsistent and contradictory as to who decided, why it was decided, and when it was decided to institute a screening process as a precondition for the employment of the UDC Malvern employees and to solicit applications for those jobs from nonemployees.

2. PI motivation according to Gaddy

Gaddy had no preexisting fixed policy of determination that necessarily called for the screening, testing, and physical examination of employees of an acquired business. Although a CPA and successful accountant and financial advisor, his immediate background was since the early 1980's that of chief operating officer and president of Pace Industries, Inc., an entity which employed from 400 to 800 employees and had a yearly turnover of several hundred employees. There was no such similar testing and X-raying of job applicants at Pace.

When Gaddy had engaged in a search of possible plant acquisitions prior to the purchase of UDC assets, he testified that it was for the purpose of acquiring a plant that could perform the type of work for which the highly valued management of the

Pace Harrison plant, in the person of James Starkey, was not receptive. Gaddy and Alford explained that the Harrison plant was highly successful as a thin wall custom die casting plant which produced 65 percent of the national market for outdoor lighting fixtures and 70 percent of that market for outdoor gas grills, but that they desired expansion into such custom work as the computer industry and the automobile industry, which required the quality control process known as statistical process control, i.e., SPC.

Gaddy, Alford, and Thigpen all testified to the rigidity of Starkey who did not want to get into a new product line and also did not want to adopt SPC for his entire plant, even for non-SPC customers, as would be required by such SPC clients like the Ford Motor Company.

Lew Zachery had unsuccessfully attempted to sell the economically failing Saline, Michigan plant in 1987. In early 1988, Gaddy, Alford, Keenan, and associates had commenced serious discussion about acquiring a specific facility. Several businesses were inspected, one of which in the open record is referred to as "I Industries" and here simply as "I." That enterprise was located in a northern state. Nowak had been employed there for 10 years in the past. On inspection of "I," Gaddy and Alford claimed to have been impressed by its "high tech" appearance, i.e., up-to-date machinery and die casting quality control devices. Gaddy testified that an unsuccessful bid was made to "I," and that he and his associates made other unsuccessful bids for other plants.

By June 1988, Zachery had already closed or was about to close the Saline plant, but was still in financial distress. Gaddy explained that UDC, therefore, was a natural target for a bargain price acquisition. Gaddy testified that, in particular, he wanted to acquire the Malvern plant because it had been profitable, had a reputation for good quality work, and would serve as a base for

future growth. Gaddy testified that it was his plan to expand the $ 7 million UDC annual business to $ 15 or $ 20 million and, after 5 years, to $ 30 million. Gaddy explained that he projected sales of $ 5 million for Malvern and $ 2 million from Little Rock and the balance from new sales. He explained that as of his testimony, sales were $ 5 million below his projected $ 15 million objective because of the adverse impact of the recession. He testified that PI lost a "lot of proprietary work." Other evidence discloses a loss of only 10 percent of proprietary work. The loss of the nearly (according to Gaddy) $ 2 million OMC account by UDC shortly before the sale almost caused him to change his mind. Documentary evidence shows that OMC-Lawnboy sales from July 1, 1987, to October 14, 1988, to be $899,000 at Malvern. Negotiations with Zachery, with Alford as the purchasing group's chief negotiator, were carried on through June and July 1988.

Although Alford and Gaddy testified that the paramount objective of this acquisition was to obtain a plant that was capable of SPC custom die casting and that factor influenced their hiring decisions at Malvern, they admitted that in their sworn affidavit testimony given in the investigation of this case, they made no reference whatsoever to SPC. In his testimony at trial, Alford went even further and testified that not only was SPC an objective, but rather it was to implement the whole Dr. Edward Deming philosophy, of which SPC is only one component. The affidavits, however, were not submitted into evidence, and it is therefore impossible for the trier of fact to ascertain whether there was an ameliorating context. Alford admitted that in his affidavit testimony he limited justification motivation to the fact that PI was going to change the emphasis of the product mix of the Malvern plant from that of proprietary to custom die casting. Gaddy testified that no documentary record was retained concerning a prepurchase analysis or appraisal of the UDC proprietary business which he said he had done in his head.

He also claimed that there were no memoranda or other recordation of prepurchase meetings and discussions reflecting PI's purchase plans and objectives. Nor were there any memoranda between himself and Alford concerning the business purpose of the Malvern plant or projections of its future budget and equipment requirements. Gaddy testified that his conclusion that UDC's emphasis upon proprietary water faucet handwheel business rendered it economically vulnerable was arrived at by reading the newspapers accounts of the recessionary economy, particularly in the building industry and his own "gut analysis."

Gaddy testified that his intention had been formed to retain all the employees of "I," had it been purchased, because SPC had been in place in that plant. Gaddy testified that it was his prepurchase perception that the Malvern plant had a sales volume of about 50-percent custom die casting but that it did not have in place SPC. He also testified that the major part of the profit of that plant was due to the proprietary work. Gaddy testified that his perception of the absence of SPC at Malvern was due to a plant visit when he concluded that because of a lack of certain production monitoring devices he had associated with the SPC process. Although he had no such expertise, Gaddy testified that the absence of SPC was "obvious." He testified that when he visited the Little Rock plant which produced 100-percent custom work, his observation led him to conclude that they were attempting to use it but it was "in disarray." He testified elsewhere that he had concluded that there was no SPC at the Little Rock plant.

Gaddy's varying perceptions with respect to the Little Rock plant are contradicted by Respondent witness Kindy who testified that plantwide SPC had been implemented and that its SPC quality control program had sufficiently progressed under Ford Motor Company's periodic inspection to the extent that they were, accordingly, on track for a Q-1 quality rating. According to Kindy, Ford only suspended its scheduled inspection to allow

PI to transfer and settle in the Ford die casting at Malvern. Contrary to Kindy, Thigpen testified that Little Rock had been in jeopardy of losing the Ford work, which was rescued only because of his extraordinary persuasive ability in convincing Ford that the PI machinery would be improved or replaced. But even according to Thigpen, the problem was with Little Rock's defective machinery and not with the way employees there implemented SPC. Kindy testified that a formal SPC program had been set up and administered at Little Rock by himself, Honeycutt and Gray. Thus his testimony is at odds with both Gaddy and Thigpen who testified to having formed a perception based on prepurchase observation that Little Rock had a minimal, nominal SPC process in "disarray." Kratz testified that some SPC training programs had actually started at Malvern but had ceased. Other than rumor, she had no direct knowledge of why plantwide implementation did not continue.

Alford, like Gaddy, formed his opinions as to the existence or nonexistence of SPC at Malvern on his direct prepurchase observations. It is extraordinary that these professional accountants, who had no direct experience or little experience in die casting and particularly in direct, daily intimate participation in the SPC process, would not have explicitly interrogated Zachery and Nowak as to whether SPC training had ever been attempted in whole or in part at Malvern, as well as Little Rock. Alford had questioned Zachery, and later Nowak in depth, as to the financial status, the clientele, physical resources, and market potential. If SPC had in fact been such an overriding concern at the time of purchase, at least Nowak would have been questioned about it. He was not. Although Thigpen and Scott Bull also toured the Malvern plant and questioned Watson about his use of SPC charting and admired his approach to quality control, there is no evidence that they reported their observations to Gaddy, Keenan, or Alford.

Had Nowak been questioned by Alford, he might have disclosed the fact that at the 1986 contract negotiations, UDC

announced to the Union that it would implement plantwide SPC training and that there had been no objection by the Union. He might also have explained to Alford why the 1986 Malvern work force was considered amenable to such training. In fact, the intention had not been effectuated. Neither Nowak nor any other witness testified why it was not. There is some testimony that some die casters and some trim press operators had evidenced some problem in mathematics. Nowak did not allude to it, and the degree and extent of those problems was not delineated. Nor was there any evidence to the effect that perceived deficiencies of employees had any effect on SPC implementation.

Nowak, had he been asked, might also have disclosed that some Malvern UDC employees had indeed performed certain functions on certain custom jobs which required the type of charting, predicting, and controlling of scrap or defect trends indigenous to the SPC process. Employee testimony as to the application of SPC to a variety of UDC products was not specifically contradicted except possibly as to the degree of employee discretion.

Not only did Nowak not discuss the subject of SPC application at the prepurchase Malvern plant with Alford or Gaddy, but he also refrained from discussing it with Dr. Bakr when he was forming his opinions about the state of the Malvern work force based on discussions with Nowak and Watson. Bakr at first suggested that he had been given no knowledge that the Malvern employees had any type of SPC experience. He amended this testimony when he testified as a Respondent witness that Watson did tell him that some SPC type charting had been done by UDC employees at Malvern.

According to Nowak and contrary to Gaddy, Thigpen and Key, the Malvern plant sales volume had been 70-percent proprietary. However, his testimony was directed to the time of PI purchase, and it is possible that as of that day of the week it was 70 percent. Connor testified without contradiction that the mix

of proprietary and custom die casting at Malvern varied monthly in that sometimes it ranged from 30-percent custom up to 70-percent custom but other times leveled off to 50 percent of sales volume. The problem with their estimates is that they do not reveal the man-hours involved in actual production. Gaddy's estimate that the proprietary work involved the higher profit suggests that it had a lower cost factor and that the labor cost, i.e., man-hours of work, were lower for proprietary work. Alford testified that over half of the custom work or 25 to 30 percent of the business was attributable to the OMC-Lawnboy flywheel die casting. He characterized that as a long running, high volume die which is not common nor the type of die work intended to be solicited by PI. According to Alford, only a small portion of custom dies at Malvern changed on a regular basis. Watson corroborated him, but Thigpen emphasized the large turnover of custom work which he implied was due to the deficiency of the Malvern plant. Watson testified that it had been rare for a custom die job to be rescinded because of the Malvern plant's employee deficiencies.

It is the testimony of Gaddy and Alford that they and their consortium of entrepreneurs intended the UDC acquisition to be the first step in the assembling of a multiplant enterprise. As noted elsewhere, Pace was not formally involved because of banking considerations and the desire to exclude one of its stockholders. Bank loan considerations also influenced the formal nature of other such acquisitions, but the nucleus decision makers were the same. Respondent does not suggest that the hiring practices at their other acquisitions differed from Malvern because they were not part of an integrated enterprise or single employer entity, other than that Alford made the hiring decisions only at Malvern. In fact, Gaddy admittedly reviewed and approved Alford's hiring decisions at Malvern.

In October 1988, Keenan and Gaddy acquired 79 percent of the stock of Mangus Tool and Die, Inc. Respondent contends

that no changes were effectuated there and the business was continued in the same manner with the same personnel without the imposition of an employee screening process or physical examinations because no changes were planned and the highly skilled die makers were presumed to be competent, and the former operator, George Spellings, requested their retention.

On November 29, Gaddy and Keenan effected a similar stock purchase of Central Tool and Die, Inc., in Florence, Alabama, also a die maker. For the same proffered reasons, they also experienced no screening, testing, or physical examination of employees. It was merged with Mangus to become General Precision, Tool and Die, Inc., as separate divisions.

In January 1990, Gaddy and his associates closed an asset purchase of Automatic Castings in Green Forest, Arkansas, which, inter alia, made simple die cast chain link fence fittings. The new corporation became Automatic Castings, Inc. (ACI). No hiatus or change in operations occurred and the employees were retained without screening or testing or back X-rays. Gaddy explained that this was so because there were no plans to change the product or method of the existing non-SPC single die cast operations. In fact, documentary evidence reveals that ACI produced a significant amount of work somewhat more complicated than what Gaddy described.

Thus we see that Gaddy and his associates had no preconceived mind-set against retaining the employees of an acquired business. It is further clear that UDC, regardless of the nature of its acquisition as an asset purchase, was intended to be continued as an ongoing operation at the same locations and with same customers at least for the most immediate future, but with purported intention of consolidating operations and expanding the custom type of die casting, half of which sales volume Malvern had already been producing.

It is conceded by Respondent's witnesses that the very characterization "proprietary" or "custom" does not necessarily imply inherent simpleness or inherent complexity of product but rather signifies ownership of the die itself. It is also conceded and admitted, in particular by Alford, that either type of die casting can be simple or it can be complicated. Alford further admitted that the Malvern plant had in fact, prior to acquisition, profitably produced some custom work, some of which included complicated die casting work.

Our analysis must now concentrate on why the hiring decision of Gaddy, Keenan, and Alford was that of not continuing with the employees of the acquired operation but rather to institute an open hiring process involving a $ 75,000 to $ 100,000 cost, and a hiatus and limitation in operations which concededly jeopardized commitments to customers by an ongoing business that was already financially vulnerable. As Alford conceded, a sensible businessman does not institute a $ 75,000 to $ 100,000 screening procedure just for the sake of doing so. There must be some compelling reason. That is most particularly so, given the business situation of the newly acquired UDC business.

Gaddy's initial perception of the Malvern plant was that it was profitable and to some degree efficient, i.e., "semi efficient." There is no effective contradiction of Connor's testimony that the Malvern plant maintained a scrap percentage well below the industry standard. (Bakr, we shall see, was told otherwise.) Thigpen testified that based on his prepurchase observation, he concluded that the Malvern plant's management had favorable "attitude and capability in the area of quality control." Bakr testified that the UDC management, i.e., Nowak or Watson, told him that there were quality problems, particularly with Chrysler's castings, the nature of which he did not specify.

Thigpen was reluctant to testify as to direct observation of Malvern UDC employees' work quality, claiming that he did not "interface" with them. He had concluded, however, that based

on what he did observe that they were a "well managed group." He admitted awareness of a formal quality recognition award from one UDC custom account and acknowledged that he concluded "from a marketing vantage" that the UDC Malvern employees clearly were concerned about quality of work product. He finally admitted that based on prepurchase observation, the Malvern plant was a "profitably, well managed, and that Nowak and his staff were deemed to be competent." Gaddy and Alford also toured and inspected the Malvern plant and observed its operations and interrogated Nowak and/or Watson prior to the purchase. It is reasonable to infer that they must have made the same conclusions.

Gaddy and Alford also were privy to Zachery's favorable representations of the Malvern plant. As Alford observed, Zachery tended to emphasize the positive virtues of the business to the extent that they listened to him with a certain amount of skepticism. It is extremely improbable that Zachery did not either directly or indirectly, by praising the Malvern plant operations, profitability, etc., cause Gaddy and Alford to obtain a favorable impression of the Malvern plant employees.

Gaddy testified that the major part of his prepurchase information about the UDC Malvern plant operation was obtained from the UDC marketing department located at Little Rock and his plant tour with Nowak during which he admittedly did not touch on the subject of SPC. Gaddy's conclusion was that UDC was "semi efficient" because, he reasoned, had it been more so, the selling price would necessarily have been too high. Gaddy had put Alford in charge of the acquisition team and deferred negotiations to him. Therefore, Alford did "most of the questioning," and, according to Gaddy, he had little direct prepurchase conversation with Nowak whom, however, Gaddy nevertheless concluded "obviously cared about" SPC. Gaddy testified that he perceived the Malvern plant operation as a profitable one and which had a reputation for "good quality work." Later, in

persistent cross-examination by union counsel with respect to the hiring process motivation, Gaddy testified that doubt as to the ability of the Malvern employees arose not only from subsequent conversations with Nowak but also from Zachery. This is inconsistent with his prior testimony and inconsistent with the general description of Zachery's representations as testified to by Alford, but also inconsistent with other testimony by Alford as to the sequence leading up to the alleged doubt of quality of the Malvern UDC employees. Gaddy did not specify exactly what Zachery said about the employees' abilities, i.e., whether it was specific or something on which Gaddy drew an inference. In further cross-examination, he testified that Zachery, in effect, praised the Malvern employees by citing their ability to obtain a "zero defect" quality award from the Chrysler Corporation.

In cross-examination, Gaddy testified, with uncertainty, that he "believed" that Zachery may have told him that neither plant had SPC. When asked if Zachery made that statement, Gaddy changed his testimony and explained that he made that inference because "they didn't represent that they used SPC." Gaddy then testified that he concluded neither plant had SPC.

Gaddy testified that when he engaged the services of Alford, he instructed him to create "the most efficient operation at Malvern" and to hire an industrial engineer with the object of effecting the "most appropriate lay out and personnel for the job." Gaddy denied that he instructed Alford in any way to discriminate against the hiring of former UDC Malvern employees. He denied having any conversation with Alford wherein they discussed the discriminatory rigging of hiring tests either before or after the acquisition.

Gaddy testified that he was introduced to Nowak after a tour of the Malvern plant conducted by Zachery. He testified that after that tour he and Alford took Nowak to lunch at the Capitol Club in Little Rock which is not far from Malvern. The thrust of his initial direct examination testimony and the sequence therein

clearly indicates that this luncheon occurred directly after that tour. According to Gaddy, it was at the Capitol Club luncheon when he told Nowak of his plan to make him the PI vice president of manufacturing and to charge him with the task of implementing SPC and the process of expanding the custom die casting work. Gaddy testified that Nowak's salary and stock purchase were also discussed. According to Gaddy, it was a "rah, rah," i.e., enthusiastic conversation. He testified that it was at this meeting that Nowak questioned him why there was to be a difference in the hiring procedures between the two UDC plants and Nowak was told that it was because of an intention to close the Little Rock plant. Contrary to Alford's and his own admissions, Gaddy insisted that no misrepresentations were made to Connor or Key as to the fate of the Little Rock plant.

In his direct examination, Gaddy fixed no date for the Capitol Club luncheon, but the context suggested that it was immediately after he first met Nowak on a plant tour with Zachery. According to Nowak, that would have occurred before any hiring process had been evolved or decided on or even suggested by anyone. Yet, Gaddy recalled Nowak discussing it as already in place.

In cross-examination, Gaddy described Alford and Nowak as the "principal parties" involved in the Malvern hiring process, but he testified that Nowak did not suggest the use of hiring tests but he did not know who did. He testified that Alford notified him after the fact that Bakr was already developing hiring tests and that the decision had already been made. Gaddy testified that he explicitly instructed Alford to avoid discrimination in the Malvern hiring procedure. Alford's testimony will disclose just why the topic of discrimination was in Gaddy's mind at that early stage. Despite the attempt to do so, no clear testimony could be elicited from Gaddy in cross-examination as to whether he ever considered hiring the old Malvern employees and conditioning their continued employability on their ability to adapt to the planned charges in the product mix, subject to training. Accord-

ing to Thigpen, Nowak and other evidence, the change in product mix ultimately to one of 70 percent custom was evolutionary and took up to 15 months. Nowak testified new orders for custom work started "filtering" in during November 1988 but the much anticipated and valued new custom Skil work took 3 months before it arrived. Thigpen testified that the implementation of SPC was a slowly evolving process and was not complete even to the date of his testimony 2-1/2 years later.

According to Respondent's independent expert witness, Die Casting Industry Consultant Warner Baxter of Detroit, Michigan, SPC skills actually constitute an overlay of acquired skills on employees' existing manufacturing expertise and should ideally be taught to workers in 56 classroom hours at a pace of 2 or 3 days over a period of several months.

In cross-examination, Gaddy testified that he had concluded that there was an absence of SPC at the Malvern plant because he observed no spectrographs or shot scopes. In cross-examination by union counsel, his awareness of SPC was challenged and he was pressed to explain his ability, as a CPA and financial expert, to make any conclusions of what was necessary for SPC, particularly the need for a spectrograph. At first, he testified evasively as to what Ford required in its Q-1 manual. Undeterred, counsel asked just what or who caused him to conclude or who told him, a non-SPC expert, that a spectrograph is necessary for SPC. He answered vaguely that he had hired experts on "quality" for such advice. He even asked point-blank who that expert was. He identified the same Warner Baxter as that person. The clear implication and necessary implication was that such advice preceded the acquisition of UDC and his plant tour and related to Dr. Deming and SPC.

Baxter was subsequently called by Respondent to testify as to Dr. Deming's philosophy, the transformation of American industry, and SPC in general. He did not relate it to the PI acquisition of UDC. Not only did he not corroborate Gaddy with

clear testimony as to the sine qua non relationship of both spectrographs and shot scopes to SPC, he gave testimony that grievously impeached Gaddy's credibility. Baxter testified that he was referred to Respondent's counsel as an expert witness in the preparation of the case for trial. He testified that his awareness of PI's acquisition of UDC was only the result of an ex post facto industry rumor. In further cross-examination by union counsel, Baxter revealed that his first visit to the Malvern plant occurred 2 years prior to his testimony which would have placed it in May 1989, over 6 months after the acquisition. Moreover, Baxter testified that his visit to Malvern to view the postacquisition operation of the plant by PI came at the invitation of Thigpen, and it was only Thigpen with whom he conversed. Further, Baxter testified that the purpose of his visit was only a very general observation of the plant's machine monitoring devices. He testified that he advised Thigpen to invest in a certain brand of monitor device. Baxter very explicitly stated that the discussion did not relate to SPC nor did he make any comments, nor was he solicited for nor did he give Thigpen any advice as to SPC. He testified, however, that he told Thigpen that if PI was interested in employee training, it ought to look into the transformation of American industry program of which, of course, Dr. Deming's philosophy is the source and SPC is only one particular outgrowth. That Baxter would have found it necessary to point out the transformation of American industry program to Thigpen 6 months after the PI acquisition is inexplicable if Thigpen, Gaddy, and Alford are credible that the Deming philosophy and SPC motivated PI's preacquisition hiring decisions. Thigpen was silent as to the Baxter consultation. His views as to the spectrograph and shot scope relationship to SPC appear to be that they are not a sine qua non, but very important devices for alloy quality control or production monitoring.

Thigpen's interpretation of SPC, insofar as it is part of a larger industrial philosophical overview, stresses the crucial importance of employee attitude. He compared it with what he termed

the Japanese word "Kaizen," whereunder employee enthusiasm is inculcated into a participatory, organic production process. According to this interpretation, subordination of the employee attitude to the success of the production process is essential. By inference, a confrontational employee attitude would be antipathetic. Gaddy testified that the Malvern screening process objective was to ascertain the employees' SPC trainability. Alford had told Gaddy that Bakr had told him that the tests were designed to do so. An examination hereafter of the tests will reveal testing for generic skills and abilities.

Gaddy testified that he had expected most UDC Malvern employees to pass the screening procedure but he wanted to ascertain by this process whether they were "suitable." He testified in cross-examination that all decisions regarding the screening procedure were subject to his approval. However, he had also testified that he was notified of testing implementation after it had been decided on. Later, again he testified that Alford first carried to him Bakr's recommendation for testing the applicants and then he agreed to do it. He then also testified that it was Alford who recommended the hiring of former UDC Malvern employees only subject to a screening process. He added that "it all happened very quickly." Alford at one point testified that the hiring process had not headed the list of PI priorities and was discussed much later in the process of acquisition. He described the hiring of employees as "item 32 on a list of a hundred things to do" and that he had asked Nowak a "zillion questions" about other things.

In cross-examination by counsel for the General Counsel, Gaddy testified that on some unspecified date and place, Nowak had told him that an unspecified number of the UDC Malvern employees had unspecified back problems, especially if they were to operate larger machines. (The Little Rock machines were indeed substantially heavier and produced a somewhat heavier part but at a much slower pace. Malvern ran machines

from about 600 to 800 tons wherein Little Rock machines ran from about that maximum to 1200 tons or so. There was some overlapping, and Little Rock at times inefficiently ran light castings on its heavier machines.) Gaddy then immediately hedged a bit on this testimony, saying that he "probably" discussed the back problems with Nowak. The latter's testimony, as we shall see, precludes this possibility. Gaddy then admitted that he actually had "very little discussion" with Nowak. However, he testified, "I think" Nowak was concerned about the ability of the Malvern UDC employees "to adapt."

Thus, on one hand we have Gaddy possessing a sanguine prepurchase view of the Malvern UDC employees wherein he expected "most" of them to pass the screening procedures, but on the other hand he expressed the vague warnings and doubts of Nowak. Gaddy then explicitly testified that he was not surprised at the high failure rate of Malvern UDC employees whom he was aware were not competing with outside applicants, per se, but who were competing with a specially constructed pass-fail test. He testified that he had "no significant reaction" to their high failure rate and that he never questioned the validity of the tests. Here, he testified that he did so despite the UDC Malvern employees' lack of a poor reputation. The vague testimonial allusion to Zachery's unspecified disparagement either eluded him when he so testified or, more likely, had never occurred. Gaddy explained his lack of concern for the high failure rate by testifying "I just wanted the best workers." He conceded that a factor which enabled PI to resume any semblance of production at all was due to the fact that about 20 former UDC employees were hired. Thus it required the old employees to train the newly hired inexperienced workers who had, in the screening process, bested other experienced, but rejected former UDC workers.

Gaddy testified that he had never been given any prediction of the expected passing rate of job applicants who survived the Malvern screening process. Nowak, Alford, and Bakr are all

strangely silent as to what they anticipated as the likely pass-fail ratio. Indeed, passing test scores were arrived at only after a review of the first 200 tests which included the UDC applicants and thus determined how many would be hired.

In further union cross-examination, Gaddy insisted that PI would have hired back "all" Malvern UDC employees without screening if they had been the "best available," as he had done at Mangus. How did he arrive at the notion that UDC, a 40-year old business with many employees of 20 years or more longevity, did not already have the best available employees? Well, he testified, it was Nowak (and Zachery) who gave him such doubt. Without that kind of doubt, he readily admitted that it would have been "foolish" to screen the Malvern workers.

Gaddy, when pressed further, testified that Nowak's doubts of Malvern employees' capability were raised when he, Gaddy, disclosed to Nowak the planned production changes at Malvern. The testing commenced well prior to October 14 but the Capitol Club luncheon occurred, by Respondent's documentation, on October 18, 1988. At first, Gaddy acknowledged that for his testimony to make any sense, he would have had to have discussed the purposed change with Nowak much earlier than October 14. Then he testified that the Capitol Club lunch meeting did not occur on the same day as the plant tour when he met Nowak. But Gaddy next testified that it was "as of that lunch" that Nowak not only knew that he "had the job" but also that the proposed product changes were discussed with him. Gaddy then testified that it was subsequent to that lunch when Nowak and Alford decided on a testing procedure and also subsequent when Nowak conveyed to Alford who, in turn, telephoned Gaddy, Nowak's doubts about his Malvern work force. Gaddy insisted that at the Capitol Club luncheon Nowak exuded complete confidence that he could do that job and that Nowak was "not negative at all." Not only is Gaddy's description of the sequence of events which formed the motivation for

testing inherently contradictory and implausible, it is in turn contradictory and/or inconsistent with Alford and Nowak who each also contradict one and another. Gaddy is also flatly contradicted by Baxter, whose credibility is clear.

I completely discredit Gaddy's obscure reference to Zachery's expressed doubts of the Malvern employees' abilities. The thrust of Gaddy's testimony is that it was Nowak who created the doubt that Malvern already had the necessary qualified work force and, according to Gaddy, even the best qualified workers. Gaddy's testimony as to Zachery's unspecified disparagement is not only inconsistent, it is improbable. Further, as Alford testified that when he heard Nowak raise some criticism of Malvern UDC employees' abilities, he was so surprised that he went into a "mild panic" because, he testified, Gaddy was of that time proceeding on the assumption that "there was no problem." Thus, Gaddy's motivation to institute a screening process as a condition precedent to Malvern UDC employees' hiring resulted from the expressed doubt of Nowak. The inference is that Gaddy and Alford had "no problems," i.e., no problems and no doubts as to the ability of the Malvern UDC employees and no motivation for screening them until Nowak sent Alford into his "mild panic."

3. PI motivation according to Alford

Alford testified first in September 1990 and was examined by the General Counsel and Union's counsel as a 611(c) witness. Alford, unlike Joure, was not inexperienced as a witness in a legal proceeding, having been qualified as a financial or accounting expert several times. In November 1991, he testified as a witness for the Respondent. On both occasions, he testified as to the motivations for the institution of an open hiring screening process as a condition precedent for the hiring of the UDC Malvern plant employees.

Alford testified in 1990 that at the first purchase negotiation meeting with Zachery, he was made aware of the Union's representation of Malvern employees but that neither he, Keenan, nor Gaddy were aware of labor law nor the possible obligation of recognition of the Union as a successor employer having hired more than a majority of the predecessor's employees. He testified that it was not until August or September 1988 that thought was given to hiring employees. He explained that he and his associates Gaddy and Keenan desired to hire employees in a manner that would avoid exposure to legal charges of discrimination, so they, accordingly, engaged the services of counsel of record. At that time, September or August 1988, they were apprised of their possible bargaining obligations if such a successorship with a majority of incumbent employees were effectuated. Inference might be made from this testimony that Gaddy, Keenan, and Alford had already decided that they would not simply automatically retain the incumbent employees as they would do elsewhere. Otherwise what would be the basis for fears of charges of possible discrimination?

Alford testified, as a 611(c) witness, that he had no experience in, and no knowledge of how to hire people but that he wanted to "go by the book" so he sought help. He testified that "through a series of meetings" and "not in one single day," did he and his associates decide to set up an objective hiring procedure. Therefore, he explained, at some point in September they decided to hire Dr. Bakr. He explained that they decided that although Nowak was the leading candidate for the Malvern manager job, they decided not to let him make the sole hiring decisions. He did not explain why. He testified that Bakr was hired and that between listening to Bakr's advice and to Nowak and Watson, he, Gaddy, and Keenan decided that they could obtain the "type of work force capable of doing what we wanted to do there." Alford testified that he relied on Bakr, Nowak, and Watson "bouncing [ideas] off each other." Thus Alford now shifted from fear of discrimination as a motivation to a desire for a "capable"

work force for intended new work. Gaddy, however, wanted the "best qualified," not merely capable workers, but the presumption that he already had them was dispelled by Nowak.

Alford testified that it was not until Bakr's first contact on about September 20 that there had been any significant discussion of hiring procedures. Any such prior conversation was "very little" and that, in fact, not much was discussed about hiring procedures at all until October 7, the date on which the acquisition was deemed to be a certainty.

Alford testified that "if he did it at all," Nowak did not give him any ideas on hiring until late September 1988. He testified that in September and August, he did "not really" discuss with Nowak how to staff the plant but that "we both assumed we'd find somebody." Such assumption infers that a decision had been made not to pro forma reinstate all the Malvern plant employees. Alford testified in 611(c) testimony that Nowak was advised of PI's product mix intent and the type of new customers that would be sought and asked if he felt whether he could produce that type of work. Alford was not asked what Nowak's response was nor the date of that conversation. He testified that he told Nowak that he anticipated acquiring more "involved" custom work requiring slides, cores, and expanded more complicated machining or "secondary" work and that PI intended to broaden the capability of the Malvern employers in order to produce more intricate and smaller products than what had been produced at the Harrison plant by Pace.

In his 611(c) testimony, Alford testified "yes" each to the questions: was the hiring procedure determined to be used at the Malvern plant because of the intent to acquire more custom die work; because PI wanted the best employees; because PI wanted to comply with the law; and because of the advice of Dr. Bakr and PI counsel of record. He answered "no" when asked whether there was any other reason for using a screening procedure at the Malvern plant.

In his 611(c) testimony, Alford explained that virtually all the nonunit, salary rated UDC employees and UDC supervisors at Malvern were retained pro forma because Nowak requested it and because Alford believed that it was impossible to find such qualified persons in the Malvern area. He testified that of the ultimate 1100 applications received, none were experienced die casting supervisors. This would appear to be surprising in view of Gaddy's awareness of a large pool of laid-off experienced employees in the Arkansas area where there is much die casting activity.

Later in his 611(c) testimony, Alford was asked whether PI had intended to effectuate any other changes in the Malvern employees' work function. For the first time in Respondent witness testimony, either in the investigation or at trial, reference was made to SPC and to Dr. Edward Deming's philosophy. Alford testified also that he explicitly instructed Dr. Bakr that PI intended to implement SPC and that he was to be certain that employee applicants had communication skills and basic mathematic skills. He testified that he had SPC "in mind" when he gave the following pretrial affidavit testimony:

> As far as skills and abilities of employees [hired] we relied on Dr. Bakr's advice and recommendation [regarding] hiring people at various skill levels.

Contrary to Alford, that affidavit quotation and other testimony suggest that Bakr took the initiative regarding perceived necessary employee skills and that neither SPC nor the Deming philosophy had been predetermined by Alford, Gaddy, and Keenan before talking to Bakr. Although Thigpen testified to an awareness of SPC, there is no evidence that Gaddy and Keenan had discussed with him the implementation of SPC at Malvern. As noted above, Gaddy testified not that he obtained his knowledge of SPC from Thigpen but rather from Warner Baxter, the acknowledged die casting industry quality control expert who

testified that he had never discussed implementing SPC at Malvern with anyone.

Alford admitted to at ignorance of die casting expertise. Indeed, he was inexperienced in any kind of manufacturing expertise. But because of his alleged prepurchase awareness of SPC, Alford testified that he desired a flexible Malvern work force with communication and mathematic skills who could process more sophisticated products under an SPC process.

In further cross-examination, Alford testified that he acquiesced to Nowak's request to retain, without screening or testing, all the supervisors (and presumably all other nonhourly rated employees, including quality control persons) because he relied on Nowak's on-the-job past observation of them and that he did not spend money "just for the sake of testing." He again testified that when he talked to Nowak about the future of PI Malvern work force, he asked Nowak if he felt he could get it handled. Neither the date of the conversation nor Nowak's response was elicited. Alford testified that at the time of his Nowak conversation he, Alford, had no specific knowledge of individual employee skills nor of their "industrial I.Q.," nor had he any awareness of the UDC employee skills or lack of them but that he viewed testing as a means for measuring their skills.

Alford's 611(c) testimony thus precludes the possibility, prior to the alleged expressed doubts of Nowak, that Gaddy, Keenan, or Alford had been advised of any negative opinion of the skilled UDC Malvern employees. Also, his 611(c) testimony, interpreted in the context of the subsequent testimony of Respondent witness Gaddy, discussed above, must mean that the date of the Nowak inquiry postdated the October 18 Capitol Club luncheon. Yet, Dr. Bakr's own records reveals that his research for aptitude tests commenced on October 4, 1998, and the testing process was already in place by October 18. The only other inference to be drawn is that Alford did have a much earlier conversation with Nowak wherein he questioned Nowak about his opinions as to

the change in product mix and employee ability. If that occurred, because of Gaddy's testimony as to an enthusiastic completely nonnegative Nowak as of October 18, 1988, the necessary inference is that Nowak did not disparage his own nor the employees' ability in such earlier conversation.

Without even considering additional contradictory testimony of Alford, Nowak and, in part, Bakr, the foregoing testimony of Alford and Gaddy clearly impairs Respondent's credibility and its defense. At this juncture, let us consider Alford's testimony given subsequent to that of Gaddy.

Alford testified as a Respondent witness who had been present at the counsel table assisting in Respondent's defense virtually at all trial sessions, and after all General Counsel witnesses and many Respondent witnesses had testified. At this point, the flow of Respondent evidence is confusing and contradictory as to whether it is Respondent's position that hiring of former UDC Malvern employees was conditioned on a screening process for predetermined abstract business reasons prior to conversations with UDC managers or whether it was decided on because of those conversations with or without Bakr. Alford's testimony does not relieve that confusion. In an apparent attempt to establish that the UDC management doubt of employee ability was the causation factor, Alford's subsequent testimony sought to establish a pre-Capitol Club luncheon motivational event, i.e., the Western Sizzler Restaurant luncheon meeting allegedly attended in Malvern by himself and Nowak. At first, Alford placed the meeting as having been held sometime in August 1988 or "most likely" in September 1988. Later, he fixed the month as September. It supposedly occurred during a plant visit, presumably either Gaddy was not present on that visit or, like Watson and others, for unknown reasons did not take lunch with Alford and Nowak. Thus, only Nowak can corroborate Alford.

According to Alford, in that undated September meeting, Nowak was already made aware that Alford was to become the

president of PI. Alford testified that one of several items he had discussed with Nowak was the disclosure to Nowak of PI's intent to bring into the Malvern plant a "new kind of work" and also its intention to close the Little Rock plant. Alford testified further as follows. He told Nowak that Starkey refused to produce a certain kind of custom work, i.e., the Skil account then being solicited by Thigpen. Alford described to Nowak the nature of this work and asked Nowak that if he were to be the Malvern plant manager, whether he could solicit such work for that plant. Nowak responded that he would have difficulty producing this type of work, with which he was familiar, because he was particularly concerned about the physical ability of the UDC Malvern employees to perform the hand sanding to the exact cosmetic standards required. Nowak told Alford that the Skil work was not what his employees were used to performing. Alford testified that he went into a "mild panic." He testified that Gaddy had assumed that there would be no problem. Alford stated, apparently silently to himself: "I was responsible and Nowak is saying, 'this isn't going to work.'" Of course, Alford's own exaggerated account of what Nowak actually said falls far short of any such conclusion. The Skil work, in fact, did not actually commence at the PI Malvern plant until April 1989.

Alford testified that he did not offer Nowak a job at the Western Sizzler meeting and Nowak did not convince him then to use any screening or hiring process. Alford testified that he considered Nowak the leading candidate for the Malvern manager position but that Nowak was not officially offered a job until the October 18 Capitol Club luncheon meeting. Both he and Gaddy were aware of Nowak's experience at "I" and were virtually predetermined and enthusiastic about his hiring, which was considered by Gaddy to be a necessity.

Nowak denied that he had been privy to the decision to close the Little Rock plant and further testified that he was not apprised of it until the October 18 meeting when he was formally offered

the PI job. Moreover, Nowak testified that it was he who raised the topic by questioning Gaddy and Alford as to their motivation for the disparity in hiring procedures at Malvern and Little Rock. Nowak testified that he explicitly raised the prospect of possible labor law violations regarding union activity, age, and sex discrimination violations. It was because of that question that they notified him that the Little Rock plant was not instituting a screening process because it was intended to be closed. His testimony is replete with further inconsistency and contradicts that of Alford, Gaddy, and other Respondent witnesses and will be examined in more detail after further analysis of Alford's 1991 testimony as a Respondent witness.

Next in sequence, as earlier noted, Alford testified that having had no hiring experience, he thought to himself that he either must rely on Nowak or devise his own hiring plan or hire an expert. The testimonial sequence suggests that the Western Sizzler meeting preceded this stage of Alford's perceptions and was therefore a motivational factor for having any screening procedures at Malvern. The testimony is not quite that precise, but the implication is clear enough.

Inexplicably, however, Alford testified that had Nowak recommended the rehiring of the UDC employees without screening, he "probably" would not have done so. This flatly contradicts Gaddy's testimony and also contradicts other testimony of Alford which attributed to Nowak the motivation to institute a screening process as a UDC employee prehiring condition. Moreover, Nowak testified that at one point after the screening process was well into formalization, Alford suggested to him that, in addition to salaried employees, Nowak ought to chose at least some hourly employees whom he considered well qualified to be hired without being subjected to screening. Nowak testified that it was he who declined Alford's suggestion and insisted that they follow through on universal screening and testing of all Malvern UDC employees. Not only is the inconsis-

tency of this testimony significant but, if Nowak is accurate, it reveals that Alford was willing to trust the subjective employee appraisal of Nowak to the extent necessary to obtain enough qualified of a minority of UDC workers to get production going without benefit of screening, testing, and medical examination. Later, in direct examination, after a recess, as a Respondent witness in answer to leading examination, Alford modified the foregoing version of the Sizzler meeting by adding that Nowak made some generalized reference to back problems of the UDC employees which would adversely affect their ability to work with the larger Little Rock dies.

In cross-examination, Alford testified to yet a different version of the Sizzler meeting. He testified that when he was told of the prospective word for the Malvern plant, Nowak did not respond to a question by Alford but rather, "out of the clear blue sky," proceeded to tell Alford that his work force could not perform work on the Skil products because of sanding requirements and the physical inability to stand all day and do intricate sanding. (There is no evidence that UDC employees sat while performing their duties.) He testified further in cross-examination that it was his decision to retain only as many UDC employees who passed the screening process and to open the field to nonemployees as well. He testified that he made that decision "unquestionably," in part because of his conversation with Nowak at the Western Sizzler. He testified to no other motivation than that he wanted the most qualified employees and Nowak raised doubts that his employees were the most qualified. In cross-examination, Alford testified that he did ask Nowak whether his supervisors were capable of SPC production at the time Nowak was hired and that, by October 15, he had decided that Nowak "was the guy," i.e., that he should formally be offered the PI job. He did not explain why he did not question Nowak about the supervisors' SPC capability until well after it had been decided that hourly rated employees needed to be tested for such capability.

In direct examination in 1990, Alford testified that Bakr had been recommended to him by Respondent counsel of record as well as one other expert whose name he did not recall. He testified that he telephoned Dr. Bakr, chatted a while and then immediately decided that although Bakr had a funny accent, he sounded "ok," and arranged to meet him in Malvern within 2 or 3 days. When they met, according to Alford, he described to Bakr the Harrison plant and PI's intention to acquire two plants for production of the type of custom work not done at Harrison. Alford testified that he told Bakr that he wanted him to help Nowak and Watson to develop a Malvern plant layout in the most logical way and that PI wanted to hire the most competent hourly paid employees.

He testified that Bakr asked if the employees were represented by a union and was told they were. What else, if anything, they discussed about the Union is undisclosed. According to Alford, the subject of the Union was dropped and there was no instruction or discussions regarding discrimination against union or UDC incumbent employees. In a most assertive manner, Alford testified that as of that very first meeting with Bakr, he had explicated his objective so clearly that both he and Bakr "came to an understanding" that Bakr was to "help us devise and if needed to administer tests to hire a qualified work force."

Dr. Bakr's testimony is not as clear and certain as one might have hoped. Bakr explained that he had difficulty recalling events 2 years in the past. He testified that his first contact with PI had not been from Alford, but from Respondent's counsel of record in a telephone call to him at his UALR office, and that he agreed to meet the next day with PI officials at Malvern, which he did, and was hired. Bakr testified that Respondent counsel very briefly described the acquisition and intended changes in product mix and that they needed help to evaluate the planned operation and improvements in work methods. Bakr's time and charges records set the first Malvern plant visit to be September 20, 1988.

Bakr testified in his pretrial affidavit that when he met Alford, the latter was very specific as to what needed to be done, i.e., to change the plant work procedure and layout. He testified as a 611(c) witness on September 20, 1990, that he was told that his role was to review the plant operation and its methods and to "evaluate personnel" to get the plant to be able to produce custom die casting work profitably or, as he amended his testimony, "more profitably." He did not testify as to whether Alford explained whether or not personnel evaluation entailed his involvement in any sort of applicant screening or testing or whether it referred to any evaluation of old employees for purpose of training. He testified that he thereafter engaged in a series of meetings at Malvern with Nowak and Watson, with whom he consulted and obtained information and suggestions on which he recommended certain changes in plant layout, machines, relocation and on which he commenced work on a series of tests to be given job applicants.

Somewhere in that series of joint discussions, according to Bakr, they "wrestled" with the question of how to provide a skilled work force who were capable of operating the intended plant and how to identify people with its needed skills. He testified that it was thus on a number of occasions that the question of testing arose and it was "probably" he, Bakr, who first brought up the idea of testing as a way to identify skills. Thus, according to Bakr's 611(c) testimony, he had no explicit mandate on September 29, 1988, from Alford to devise and administer a prehiring screening procedure. Rather, the idea arose during many conversations with Nowak and Watson. His testimony, however, does suggest that he was initially to "evaluate personnel." That is perhaps some slight but very weak and ambiguous corroboration of Alford that prior to Bakr's hiring, doubts were raised as to the Malvern work force ability which necessitated evaluation by an expert. Thus, according to Bakr's testimony, he was not given the option of even considering the hiring and retraining of the former UDC employees.

Thus, according to this version of Respondent's defense, the decision to subject the Malvern employees to the precondition screening-testing process was not made because of some preexisting policy or abstract desire for prehire screening or mind-set of Gaddy, Alford, and Keenan but because of doubts as to Malvern employee abilities revealed by the Malvern management, i.e., Nowak. However, for that theory of defense to have credibility, it was necessary to fix the Nowak revelations prior to Bakr's hiring. Therein lies the problem. Not only does Alford's testimony contradict Gaddy, but it contradicts that of Nowak whose detailed 611(c) examination by counsel for the General Counsel covering a step-by-step, meeting by meeting chronology of prepurchase contacts between Nowak and any PI representative renders the September 1988 Western Sizzler meeting an impossibility, except for Nowak's own mendacity or unreliability.

4. PI motivation according to Nowak, exclusive of Bakr's participation

Nowak testified that the first contact he had with PI regarding a job offer was on Sunday, October 16. But he testified that he first met Alford about 3 or 4 weeks earlier at the Malvern plant when he was accompanied by a group of persons, including Zachery and Gaddy. Alford and Gaddy were introduced to Nowak as potential buyers of the UDC business, and Nowak was instructed to cooperate with them during their tour of the plant. That first meeting was a fact-finding venture with respect to customer base, profit base, and financial data. The following sequence of meetings occurred. Within a week of that first meeting, Alford, Gaddy, Nowak, and Watson discussed the identity of customers, sales history, recently lost accounts, and its impact on profitability for the forthcoming year, and sales trends. Gaddy expressed concern over the recent loss of the Lawnboy flywheel account and told Nowak that there must be an effort to obtain more custom die work for the operation to be

profitable. Alford was concerned about the dip in sales and asked whether it was a seasonable phenomenon. The seasonality of the proprietary product, i.e., water spigot handwheels, was explained to him, i.e., it is allegedly construction industry dependent (according to Gaddy). On October 14, 1988, only 35 employees were actively on the job according to Nowak. The others presumably were in layoff status. Some may have been terminated or laid off in expectation of the closure. There is no explanation in the record as to the reason for the low active employment level, how long it had lasted nor whether it was temporary. Respondent's documentary evidence discloses over 100 UDC employees. It was stipulated that about 84 former UDC employees who were screened were employed by UDC on October 14, 1988. Nowak testified also that despite the apparent layoffs, the hiring procedure's necessary shutdown of production and hiring delays did cause delivery problems. Alford testified that it took 6 to 8 weeks of steady hiring before enough employees were available for "full production," i.e., for work that was available to them. By November 30, PI had hired 49 employees and by December 31, 64 employees. Alford testified elsewhere that he told Key that full production could not be expected until January and that commitments to customers would be disrupted because of the hiring delays. Clearly then, despite the active employment of only 35 employees at closure date, there was an almost immediate need thereafter for full employment of the alleged discriminatees.

Nowak testified that at that second meeting, Alford toured the plant with him. He testified that the Malvern employees were not discussed that day. Nowak testified that he had "one more meeting" and only the third meeting with Alford on the date that Alford introduced him and Watson to Dr. Bakr as an independent industrial engineer who had been hired by PI as a consultant, and with whom they arranged a meeting which was held about 1 or 2 weeks before the purchase. Nowak testified that there had been no other meetings that he could recollect. A meeting in the nature

of the Western Sizzler meeting would certainly have impinged on his recollection which, as an adverse witness, was one of aggressive certitude.

Nowak testified that when Alford introduced Bakr, he told him that it was for the purpose of reviewing the facilities and the plant operation as a precedent to a study that Bakr would make with an eye to determine if there needed to be any changes that might enhance the plant's profits and productivity. Thus, according to Nowak, changes in operation were something that had not yet been determined and not as described by Alford. Nowak went on to testify that in his presence, Alford instructed Bakr as to his mission, i.e., to tell PI what would have to be done to the plant in the way of equipment and layout to become saleable or profitable. According to Nowak, it was at this meeting with Bakr and Watson that Alford elicited from Nowak and Watson their review of what operations would, in general, be expected as the result of new custom work. That is the extent of his communication with Alford up to that time.

Nowak testified, however, that he told Bakr that based on his experience at "I," the type of custom work that Alford "probably" wanted to solicit for Malvern would necessitate considerably more handwork, the operations would not be totally controlled (i.e., a high turnover of short orders required flexibility), and cosmetic-contoured hand sanding in the removal of a parting line on the face of a casting would be required. He testified that he told Bakr that such castings were more complex in geometry and configuration than what UDC produced. Nowak testified that UDC employees had not sanded in the manner "now defined" for PI employees. He failed to explain convincingly in his testimony precisely why the contour sanding would be that much more difficult from that already performed by UDC employees in the removal of "flash," excess metal casting. Nowak testified that he told Bakr that he "needed a special orientation process" at any additional hand sanding operation

and also for any additional work in the nature of "single point drilling," special finishing or custom painting. They also discussed the UDC flow of product through the plant and its cumbersome outdated nature.

Nowak was not clear as to what part of his communications was with Bakr alone as they toured the plant, or in Alford's presence. He testified that Alford requested Bakr to assemble a proposal as to a floor plan and to do so quickly as the plant purchase was imminent. Nowak was not offered a job at that time. He recalled giving no further advice to Bakr or Alford. He placed the meeting as 1 or 2 weeks before the asset purchase. He testified that prior to the closure, only three more meetings were held with Bakr and Watson and that, at that point, Alford was "out of the picture." Clearly, his testimony thus far cannot be construed to be a significant disparagement of UDC employees' ability nor even a doubting of it. At most, he recommended to Bakr, not Alford, that an "orientation" process, i.e., some limited specialized training, might be needed for the type of work Alford "probably" desired to acquire. There was no reference to SPC, and Nowak did not tell Bakr that he had doubts as to UDC employees' general adaptability, their mathematic abilities, their communication skills, their physical impairments or that they were not capable of cosmetic sanding. He failed to testify that Alford charged Nowak with the responsibility to devise and/or apply hiring procedures.

There is no room within the circumference of Nowak's account of his prepurchase conversations to include therein the nature of the Sizzler conversation with Alford, regardless of location. Indeed, therefore, Nowak indicates it was only in subsequent conversations he had with Bakr where the subject of Malvern UDC employees' abilities was first ever mentioned by him or Bakr, or anyone else. Thus Nowak's testimony not only contradicts Alford's Western Sizzler testimony but also Alford's representations to Connor and Key that Nowak convinced a

reluctant Gaddy and Keenan into accepting a screening procedure with its inherent production shutdown. Of course, Alford's own testimony is self-contradictory.

Nowak next proceeded with a series of meetings with Bakr, the description of which in part is corroborated by Watson and Bakr, but part of which is contradicted by their testimony or significantly inconsistent with it.

Dr. Bakr's time and charge record log reveals that he made the following Malvern plant visits for the reasons as noted there:

Date	*Hours*	*Description*
Sept. 20, 1988	5	"discuss project"
Sept. 22	5	"review proposed improvements & Define project scope"
Sept. 27	4.5	"review code/classification analysis"
Sept. 29	4.5	"die cast work cell planning" [N.B. the log indicates for Oct. 4 "aptitude tests -- research" at a nonplant location]
Oct. 5	3	"review work classification"
Oct. 10	3	"job description"
Oct. 11	3	"work cell planning"
Oct. 12	3	"aptitude tests & set-up"
Oct. 17	5	"meeting at Malvern VO-Tech" [an employment agency]

Oct. 19	3	"Test set-up" [the log also contains 17 additional hours on non-plant site work on "blue print reading test," "Manual for dexterity tests," "Test & video-tape for die cast principles."
Oct. 24	2	"Test progress & data"

Dr. Bakr's log also reveals nonplant site meetings with Respondent counsel on October 14 and with "Dave [Watson] & Margie [Kratz]."

The September 29 entry is not explicitly entitled "plant visit" but, since it involved 90 miles expenditures, identical to a plant visit cost charge, it obviously occurred at the Malvern plant.

The UDC closure occurred at the end of business on Friday, October 14. It is not clear whether Bakr was introduced to Nowak during his initial September 20 visit. However, Nowak's description of his third meeting with PI representatives seem to coincide with Bakr's log entry description for his second visit on September 22.

Nowak's testimony as to having had only three more preclosure meetings, all within 1 week, seems to preclude the September 27 and 29 meeting which would have been a significant meeting, because it was on October 4, prior to his next meeting, that Bakr commenced research for aptitude tests. It is possible that Bakr met with other UDC managers on September 27 and/or September 29. As we shall see, it is highly unlikely from Watson's testimony that Bakr had discussions about the need for testing, with Watson alone, that caused him to start this research. If he did not meet with Nowak on September 27 or 29, and did not get his testing ideas from Watson alone, then he must have been given instructions to devise a testing procedure on or before September 27, a date well before Nowak testified that he had any discussions or made any comments about UDC employees'

sanding experience or any other new job functions. As we have seen, the most he discussed with Bakr was the possible need for "orientation," i.e., training. Tests were not even mentioned according to Nowak. Thus, if Bakr received such test development instructions, he got them from Alford at a time when Nowak testified that he had not yet discussed the employees with Alford. Further, at the only three remaining preclosure meetings Nowak testified that he attended with any PI representative, Alford "was out of the picture," i.e., he had no such meeting. Therefore, according to Nowak's 611(c) testimony, there was no Western Sizzler meeting; there were no employee ability doubts expressed by Nowak; there was no basis for Alford to panic; there was no reason to disabuse Gaddy of his assumption that there were no problems regarding the UDC employees' ability and, according to Gaddy, no motivation to condition the rehiring of UDC Malvern employees on a prehire screening-testing, physical examination, and back x-ray process, a process which Gaddy admitted would otherwise have been "foolish." Nowak testified as a 611(c) witness on September 18, 1990. He testified as a Respondent witness on July 23, 1991, but despite responding to elicited categorical denials of unlawful motivation, he failed to testify to any further conversation with Alford than he had in his prior testimony.

As revealed above, a vast amount of Alford's and Gaddy's motivational testimony is simply inconsistent and/or outright contradictory to their motivational statements made to Connor and Key, i.e., that Nowak persuaded a reluctant Gaddy and Keenan to jeopardize production commitments by incurring a hiatus solely for the purpose of a plantwide screening and testing of the UDC Malvern employees, whom they apparently must have decided could have continued with the ongoing and anticipated production schedule and with whom Gaddy perceived to be no problem until Nowak's alleged Western Sizzler disclosure. It is also contradictory to Alford's very first explanation to Connor.

As observed above, Alford's own testimony is internally improbable, inconsistent, and self-contradictory. Of further significance is that nowhere in Alford's testimony is there a disclosure that he ever explained to Connor and Key the need for SPC training at the Malvern plant nor did he refer to doubts about the Malvern plant UDC employees' ability to perform work on an expanded custom die casting product mix. Such explanation, if it existed, would have been the most obvious to make in the face of admitted persistent accusations of unlawful motivation. The intended closure of the Little Rock plant in no way prevented such explanation. It is more logical that Connor would have been told that the Little Rock plant was already performing 100-percent custom work and its employees had been trained in SPC and were on the way to obtaining a Q-1 rating from Ford. In light of Kindy's testimony as to such, Thigpen's generalized contrary conclusions based on observation of the poor state of machinery at Little Rock is not credible. Kindy, whose managerial expertise was admittedly highly esteemed by Respondent, testified that despite the poor state of equipment, the Little Rock employees were able to satisfy customer requirements, i.e., inclusive of Ford's Q-1 progressive quality improvement program.

Of further significance from Nowak's 611(c) testimony is the complete absence of any preclosure discussion with any PI representative regarding the UDC Malvern employees' trainability in SPC. That quality process itself was not even discussed with him as an explicit objective of PI. Rather, it was the physical nature of the new work to be solicited that was discussed. Nowak, as witness for Respondent, testified that in his discussions with Bakr, no questions at all were raised as to the quality of the UDC work force nor did Bakr ask him whether SPC had been used in the plant. Such testimony is inconsistent with Bakr's testimony that he was initially immediately ordered by Alford to evaluate personnel. Of course, Respondent adduced generalized evidence that many of the customers whom they intended to solicit demanded an SPC operation. However, SPC

in relation to the abilities of the incumbent employees was not explicitly discussed between Nowak and Alford in either version of their testimony, as it was not discussed between Nowak and Bakr according to Nowak. Alford testified, without corroboration, that he first questioned Nowak as to the UDC supervisors' SPC abilities when he hired Nowak, i.e., after the acquisition. The relevant factor here is not the true nature of SPC, but rather PI's perceptions at the time of decision making.

5. PI motivation as a result of Bakr consultation according to Nowak

If Respondent did not institute a prehiring screening process for Malvern employees because of a preacquisition motivation precipitated by Nowak's expressed employee ability doubts to Alford, is there evidence that it did so as a result of recommendations of Bakr, Nowak, and/or Watson, either jointly or singly, arising from those preclosure plant meetings between them? One of Alford's various explanations is that the hiring procedure was the result of "bouncing ideas" off the three of them, albeit that testimony is inconsistent with his other testimony.

Nowak testified that he had three preclosure plant meetings with Bakr, all within the same week on Monday, Wednesday, and Friday during the week preceding the week of closure, i.e., October 3, 5, and 7. Bakr's time and charges log, which I find eminently more reliable, accurate, and credible, reveals no such sequence. The only preclosure week of more than one meeting on either Monday or Wednesday occurred on October 10, 11, and 12, after Bakr already commenced his research for "aptitude tests." The meeting preceding those meetings was on October 5 where Bakr reviewed the work classification. The one before that was on September 29 for "die cast work cell planning."

According to Nowak, his fourth meeting, i.e., the first of the three non-Alford, preclosure meetings, consisted of himself, Watson, and Bakr wherein Bakr again toured the plant, took

notes and measurements, and discussed "standards" and the flow of material through the plant and wherein Bakr asked for a plant layout, of which there was none. Nowak described the next sequence of events as follows: On Wednesday, Bakr returned and again met with Watson with a preliminary floor plan and a proposed relocation of machines. Bakr asked for job descriptions and was told none existed. Bakr took notes. There was a discussion of proposal to create work cells and the concept thereof, for the purpose of reducing the work flow, i.e., each cell would be composed of a die cast machine and a trim press, or also some vibrators, etc., with relocation of other functions to the paint room. Bakr complained of being under a time target pressure. Bakr's log of September 29 and October 11 refers to "work cell planning" visits.

At the sixth meeting (third in the non-Alford meetings, according to Nowak) on Friday, 1 week exactly before closure, Nowak reviewed Bakr's final plant layout sketches and some proposed job classifications he also had prepared. They discussed the possibility of combining certain job classifications, i.e., changing the flow of production and the responsibility of the die caster. They discussed the impact on the work function by the expected new customer work, e.g., slides or moving members that create different mold configurations and ejectors, the moving members which push out the metal. They discussed an increased responsibility to care for the tools owned by the customer, inherent in custom die work, of which 50 percent of Malvern's sales already included.

It was within the context of the discussion of additions or changes to job functions, only 1 week before closure according to Nowak, that he and Bakr discussed the "need [for] a way to evaluate on an objective basis [the] job applicants." Nowak, certain of the sequence of these events, testified that Zachery had already announced during that very week that UDC employees were to be terminated and he, himself, had contacted a "head

hunter" and had two possible jobs lined up for himself. According to Nowak, he and Bakr thereupon discussed how job applicants would be screened. He testified that this was the very "first mention of employees." Nowak is obscure as to how the assumption was made that the old employees would not simply be recalled to their ongoing production activities and subsequently oriented or trained as new work was acquired but, instead, would be thrown into an open pool of "applicants." He is also obscure as to just what he and/or Bakr or Watson said in more detail about the subjects of objective evaluation and screening and their necessity.

Nowak testified that there was no discussion at all which involved consideration of the automatic retention of incumbent employees. He testified that Zachery's termination constituted a "done deal." Again, we are reminded of Alford and Gaddy's testimony that there was no such "done deal" until Nowak raised those "doubts."

Continuing with the description of Nowak's alleged October 7 meeting with Bakr wherein the idea of an applicant screening procedure was allegedly first raised, Nowak testified that he and Bakr discussed how they would go about screening job applicants "to meet the requirements of these classifications." Neither in his 611(c) testimony nor in subsequent testimony for Respondent did Nowak give the specifics of these discussions. Nowak first testified that the decision not to screen and test the supervisors was made "in conjunction" with Bakr. When pressed by counsel for the General Counsel, he testified that the supervisory hiring decision was made by Bakr "by himself."

Nowak testified that Bakr agreed to many of "our" recommendations as to the nature of the screening and testing process. The "we" must necessarily refer to Watson whom, it may be recalled, Alford also incorporated into the test developmental process and whom Bakr did as well. Nowak listed the paint tree test as one of his and/or Watson's recommendations. Nowak testified that

he also recommended that Bakr adopt a basic applied electricity test for maintenance employees that Nowak had derived from an earlier optional in-plant basic electricity refresher training program that had been allegedly open to UDC maintenance employees. Pilcher's testimony indicated the limited nature of the program. Nowak testified that Bakr made specific recommendations as to certain types of tests, e.g., a mechanical aptitude test, a verbal skills test, a card sorting test, PTI and NTMA tests, etc. He also testified that he and Watson rejected some specific tests that Bakr proposed consisting of certain actual die casting job functions which, on consultation, he and Watson considered to be "cumbersome."

Thus, Nowak testified in effect, that the first mention of employee ability and the very idea of screening and testing arose at this purported October 7 meeting, so close to the closure date, and yet Bakr remarkably and instantly responded with specific recommendations. Bakr's log and his testimony contradict Nowak. The log discloses that he started off plant test research on October 4, that he started offsite work on job classifications on September 30, continued discussion on that type at the plant on October 6 and October 10 and commenced the test setup on October 12 at the plant. It was impossible to have raised the idea of testing for the first time on Friday, October 7, and to have telescoped the conception of and revelation of testing ideas spontaneously on that date. Bakr's log shows that he worked on those tests away from the plant on October 4. His testimony suggests a series of meetings before he came up with test suggestions.

According to Nowak, the next event that occurred was a meeting between Watson and Bakr on the weekend before closure when Watson went to Bakr to obtain the tests prepared by Bakr and then delivered the tests to Nowak, with whom Watson discussed their administration and grading. The only off-plant weekend meeting noted in Bakr's log with Watson is on

Saturday, October 15, at UALR (with Kratz) and also on October 17, 1988. Nowak testified that after Watson delivered Bakr's tests, there were no other meetings of any kind. He testified that he reviewed Bakr's tests and concluded that they were fair and objective but that he did not know what to do with them because he and Watson did not know what role they were to play at the PI operation, i.e., they had not yet been offered a job. Certainly, they would have had a strong clue if it had already been determined that, according to Alford, the supervisors were to be retained without screening pursuant to the UDC plant manager's past evaluation of their known and observed abilities.

Nowak testified that on Sunday, October 16, he, Kratz, and Alford met at the plant and Nowak was then told that he would be acting as plant manager. He testified that Alford then asked him where they stood with respect to Bakr and the job applications and whether they were ready to screen and hire employees. It was then that Nowak told Alford that he would hire Watson and discuss the hiring process with him. Alford interviewed Kratz separately that Sunday.

Nowak testified that Alford told him that it did not appear to him that there were no potential foremen other than the original group of UDC foremen who had any experience in die casting and he solicited Nowak's opinion. Nowak testified that he answered that he would be "comfortable" with them and, with a few exceptions, would rehire them all without screening or testing. This is inconsistent with his testimony that Bakr decided to hire the supervisors unscreened. However, it is conceivable, although not likely, that Nowak did not tell Alford that Bakr had already decided the issue.

According to Nowak, Alford told him at the Sunday meeting that he had reviewed the applications of salaried UDC employees and requested Nowak to do the same but Nowak replied that he recommended the rehiring, without screening, of office and other salaried employees except for the receptionist and one

quality control technician. It was then that Nowak rejected Alford's suggestion for immediate, nonscreening rehiring of at least some hourly rated UDC bargaining unit employees whom Nowak considered to be qualified in order to minimize lost production time. Nowak testified that he told Alford that there were some "fine people" among the UDC employees but that they needed to get the "best people" for the job, which would be accomplished by the testing process devised by Bakr and himself. This is the only testimony of Nowak that remotely approaches Alford's characterization of Nowak as being the person who persuaded the reluctant Gaddy and Keenan to adopt the screening process. According to Nowak, Alford proposed that only some of the unscreened UDC employees be immediately reinstated. According to Alford's and Connor's testimony, Alford represented that Nowak was the original cause of the entire screening procedure in the first place.

Nowak testified that he had, of course, been aware of the quality level of UDC employees in the past but he was uncertain how they would adapt to a "spiralling influx" of new work. Later, he admitted that the "influx" was, in fact, gradual. He testified that the next meeting he had was with Alford and Gaddy in Little Rock on Wednesday, i.e., October 17. More likely, it was October 18, according to Gaddy, at the Capitol Club luncheon described above.

When he later testified as a witness for the Respondent in July 1991, Nowak testified that the reason that PI solicited non-UDC employees was because Alford and Gaddy's plans called for a "dramatic" change in business which called for shorter customer job runs and more frequent type of die work turnover and it was necessary to have employees with a "shorter learning curve" ability. He testified that "we" wanted to know whether the UDC employees were better than the "general public at large." He testified that the UDC employees could very well have been

reinstated without screening but only with "uncertainty" that they could adapt "in a timely fashion."

Back in September 1990 as a 611(c) witness, Nowak testified that so many applicants were failing the PTI tests (described elsewhere) that it became apparent that not enough experienced UDC employees would be rehired to enable resumption of any production, new or old. Thus he and Watson persuaded Bakr to give UDC employees a five-point PTI test bonus. Nowak explained that to Alford and himself "it made sense . . . to get former UDC employees in there if we could [because] there would be less of a learning curve." So, by Nowak's own admission, the former UDC employees were in fact perceived by him and Alford to have required a lower learning curve than the general public at large; and, when the results of the screening process were producing supposedly adaptable employees but with a longer learning curve, that process was deviated from sufficiently to give PI just enough of the UDC employees to get the plant operational. There is no convincing explanation by Nowak as to why he arbitrarily selected a certain cutoff point in the PTI score or why he adhered to a hiring process that patently to him was not producing employees with a learning curve short enough to expedite production. He testified, however, that he would have lowered the cutoff score further except for Bakr's opposition. According to Nowak's uncorroborated testimony, Bakr warned that a lower score would cause "trouble" later on when the plant work became more complex. The trouble with that advice was that the testing process had not yet been producing employees capable of carrying on the old job function without the help, training, and experience of at least some former UDC employees.

6. PI motivation according to Dr. Bakr

Bakr's testimony as to the sequence of of these discussions with Nowak and Watson, except for his log, is generalized and imprecise. He testified vaguely that the "idea" of testing was not

"seriously" discussed until after the job descriptions were made available because he was unaware, until then, what skills would be required of the employees. He was not sure when he finished his job skills compilation in relation to plant closure but, soon after that, "we," i.e., he, Nowak, and Watson, got into the "selection of tests."

In his 611(c) examination, Bakr's description of the circumstances of setting the PTI cutoff score differs from that of Nowak. He testified that he recommended a cutoff score of 40 of a possible 80 points simply because it was a 50-percent score. He testified that it was merely his "subjective judgment." He testified that "we" ended up recommending 30 as a decision jointly reached because of the high rejection rate, i.e., they recognized something was wrong. However, no objective analysis was made to ascertain a mean score. He did not expand on that testimony in his later testimony as a Respondent witness. Thus there is no scientific basis for the conclusion allegedly attributed to him by Nowak that a lower PTI score would endanger to a significant degree the quality of the employee hired. Bakr and Watson contradict Nowak's testimony that it was Bakr and Watson who determined the cutoff score of the NTMA tests given to maintenance employees.

Bakr's testimony reveals also the participation of Nowak and Watson in the evolution of the testing procedures and the establishment of other cutoff scores and their influence on him, including the use of medical examinations and back X-rays requested by Nowak instead of a physical ability test proposed first by Bakr. Thus Bakr testified in generalities that he had been informed by Nowak or Watson that the Malvern plant had a quality problem, that its scrap rate was only at the accepted industry standards, that employees needed training for contour cosmetic sanding and that he had not been fully advised of the employees' prior exposure to SPC processes or SPC training. Bakr also gained the impression that custom work was by its very

nature much more complicated than proprietary work and the custom work done by UDC. In sum, Bakr's entire conception of the evaluations of the UDC employees, the nature of work performed by them, and the nature of new work to be obtained was based on information given him by Nowak and Watson, except for a very limited observation when he visited the plant and felt pressured by a deadline. As a Respondent witness in cross-examination, however, he admitted that Watson told him that a certain limited degree of charting had been done by some UDC employees. He apparently did not investigate nor was he told the extent of it, nor was he aware that some custom sanding had actually been performed by UDC employees. There is no evidence of any history of employee communication problems or significant mathematics disabilities except as discussed above, and no evidence Bakr was informed of it.

Despite Nowak's recognition of the experience of UDC workers as a necessary factor for successful resumption of production and his assertion that their plant experience ought to have given them an advantage over the general public given the nature of the tests, Bakr put a completely different emphasis on the tests objectives. He testified the objective of those tests, as he was given to perceive it, was to ascertain an abstract, generic, potential ability in employees with respect to manual dexterity, communication abilities, etc., and that, to do such, the tests must equalize all applicants as on a "level playing field" whereby past die casting experience would not give the UDC employee any advantage over the nonemployee. To Bakr, the suggestion that UDC past experience would give them an advantage was contrary to the intent of the tests. Bakr seems to admit that past die casting experience ought not to have had a measurable impact on the scores. Thus the tests sought to aim at measuring an applicant's general dexterity, communication skills, learning and adaptability potential, and not what ability the person actually possessed for the specific functions of die casting either SPC or non-SPC.

Although there is much confusion in the testimony of Nowak, Watson and Bakr as to who recommended what to whom in the assembly of the screening and the testing of Malvern plant job applicants, according to Bakr, his conclusions and recommendations were premised in very large part on information and advice given to him by Nowak and Watson.

Although SPC adaptability was alleged to have been the concern of Gaddy and Alford, there was no participation in the development of the Malvern plant screening process by any personnel from Little Rock where SPC had been initiated. Kindy testified that the Little Rock quality control manager, Honeycutt, had devised and implemented SPC training for Little Rock employees in 1985. Honeycutt later transferred to Malvern and was terminated with Connor and Key. Honeycutt transferred to Malvern for the purpose of instituting SPC training there after resumption of operations by PI.

At one point in Bakr's testimony, he indicated that he had dealt more with Watson than he did with Nowak. He identified documented suggestions which which he attributed to Watson, and he credited Watson with suggesting the concept of the work cell although he attributed suggestions regarding the identity and impact of the new product mix and machine layout to both Nowak and Watson, which Bakr testified had occurred at their September 22 meeting.

Although Bakr denied having had received any explicit unlawful discriminatory instructions nor having had such intent himself, he failed to testify that Alford or Gaddy charged him with the responsibility of devising tests for the purpose of specifically identifying SPC capabilities of job applicants or that either of them had made any reference to Dr. Deming or work cells. He testified that the idea that the new product mix of custom work would so drastically change old employee work skills by the addition of extremely more complicated castings under an SPC process foreign to virtually all UDC employees,

were implanted during conversations with Nowak and Watson. He testified that suggestions of both managers were incorporated into his testing recommendations. He admitted that many of his recommendations for testing had been limited to certain types of job classifications but, with his agreement, were expanded to include other unrelated classifications based on Nowak's urgings that there would be greater job rotation under PI than UDC. However, he admitted in cross-examination, as a Respondent witness, that it was Watson who told him that there had been a limited amount of SPC applied at Malvern in a "hit or miss" manner but that it had not been "widely applied" throughout the plant. He testified, without corroboration, that Watson told him that although some parts had been subjected to the charting, prognostication and control process, quality problems had been experienced in the Chrysler work.

The General Counsel elicited employee testimony, in part corroborated by Watson, which disclosed that SPC functions performed at Malvern under PI are virtually the same as those which had been performed on a more limited basis under UDC, albeit the phrase "SPC" may not have been recognized by the employees. Nowak, as a 611(c) witness, admitted that SPC had not been new to UDC employees. He contradicted employee testimony only to the extent that he claimed that under UDC when the machine operator identified a trend and/or nature of the problem, the UDC operator did not assume responsibility to shut down the process on his own discretion as under PI, but rather the UDC operator notified a supervisor to do so. Under further questioning, Nowak admitted that when the UDC operator concluded that a machine was not functioning properly, he would indeed exercise his judgment to shut it down and thereafter to notify his supervisor.

Nowak made no reference to UDC employee quality problems or adaptability in the SPC process or otherwise. He rather admitted the UDC employees' competency within the frame-

work of the type of work to which they had been accustomed and half of which was custom die casting. Although he emphasized the basic communication skills, basic mathematic and charting ability, and adaptability required of employees performing SPC, other than his foregoing alleged remarks to Bakr, Nowak cited no relevant SPC problems of UDC employees to Bakr nor in his testimony. There is no evidence that Nowak at any time expressed doubts to Alford or Bakr as to the UDC Malvern employees to adapt to the SPC process. His testimony is silent as to the Deming philosophy. It next behooves us to examine Watson's testimony as a 611(c) witness and as a Respondent witness to verify and identify his representations to Bakr regarding the UDC employees and his participation in the screening process attributed to him by Alford, Nowak and Bakr.

7. PI motivation according to Watson

David Watson had commenced employment at UDC Malvern as an industrial engineer in October 1986. He reported directly to Nowak. It was his responsibility to set the production performance standards of the UDC Malvern employees, whom he conceded routinely met or exceeded them. He testified that UDC employees had performed work on a variety of custom products which, contrary to other Respondent testimony, involved use of slides, cores, and ejector pins. He concluded that in the performance of those duties, the UDC employees were required to adapt to new tooling for each custom product, and that involved a new casting die and a whole new machine package with new "flutters," cores, and ejector pins, for which use and installation they had to be retrained. Such jobs included brass die casting which, although substantial at one time, was being phased out at and after the acquisition because of a decline in brass sales market.

According to Thigpen, there had been a high turnover of UDC custom work. If his testimony is credible, that would mean that

the UDC employees had been more adaptable than even Watson gave them credit for possessing.

Watson identified a variety of custom products produced at one time or other by the UDC or its predecessor employees, a significant number of which continued in production by PI. He described a Chrysler job acquired by Hoover where operators took readings, plotted, and charted graphs with "standard" SPC charts calculated mathematically and determined trends with the use of a gauge. He identified the Indiana General Motors Corporation job for 1980 to 1984 as an SPC job. He testified that there were others, of which he could not recall the names, which ran from 5 to 10 years. Employee testimony identified a variety of other SPC jobs.

Watson admitted that some employees were very good at their jobs, of which certain jobs, such as the trim press, required certain employee qualifications. He admitted that UDC's policy was to employ the best employee for any particular job. He admitted that UDC secondary employees had been rotated "to a point" and that employee job transfers under collective-bargaining job bidding procedure required that the transferee must meet the required job standard.

Although Respondent characterizes Pilcher's grievance activity descriptions as generalized, Watson, like Nowak, admitted that employee grievances were filed and actively pursued by the Union. Other employee testimony corroborates Pilcher with documentation of recorded union notes. Watson referred to grievances which arose out of production standards that he set and which resulted on occasions in the resetting of work standards.

Watson's self-description of his role in the development and application of the PI screening and testing procedures raises the image of an extremely reluctant, detached participant in a project that he perceived to be distasteful. His demeanor of a 611(c)

witness was that of uncertainty, hesitancy, and evasiveness. He took the lead on Respondent counsel's objections and gave no impression of candid spontaneity or reliability of recollective ability.

He testified that although he is an industrial engineer, he has had no education in industrial psychology and does not and did not consider himself certified or competent to design and administer employee job applicant tests nor to determine the scoring of tests. In his opinion, no test devised by PI replicated an actual job function at PI on a straight duplication comparison. This, of course, is compatible with Bakr's goal to obtain a "level playing field" based on a more generic test process. Watson testified, "I am not a testing person." He explained "I believe in testing . . . I just didn't like this situation." Watson testified that he was "pushed" into doing the scoring. He quickly added that "pushed" was perhaps "the wrong word." He testified that he did not know why he did not ask Bakr to determine the scoring. After extensive probing in 611(c) examination, Watson testified that he had too many friends among the UDC applicants who had been eliminated by the tests and that their failure hurt him. He admitted that he had raised his concern to Nowak but he "basically got no response [and] it was business as usual." He also admitted that in essence he asked that he "prefer not to do this." He testified that he was not qualified to set the pass-failure scores and that "in most cases I dumped some of those back on Nowak." Watson testified that he anticipated in advance that UDC employees would be eliminated and he would be blamed "by the pure fact I was there." Thus, at least, Watson implied that he expected in advance a high failure rate to be effectuated by the testing process contrary to testimony of Alford, Gaddy, and Nowak that they either assumed all the UDC employees, or a vast proportion, would pass the test because they had inherent advantages.

In his testimony as Respondent's witness, Watson had by then been promoted from his position as PI supervisory industrial

engineer to Nowak's successor as PI vice president of operations at Malvern. His demeanor did not change even in direct examination when he appeared to be puzzled, hesitant, and unsure of the responses that Respondent counsel sought to be elicited. In an attempt to rehabilitate his prior testimony, Watson weakly asserted that he is "all for education and tests." He explained that he did not want to engage in the testing process because of adverse employee reaction and that he "didn't have the time." He again testified, "I was pushed into doing tests." After a hesitation and a glance at Respondent counsel, he modified that statement by adding "or chosen." In cross-examination, he denied that he had asked to get out of the testing assignment because the high failure rate depressed him but, rather, claimed that his testing involvement was limited to a time after the hiring started and that when he got out of it, he did not know the percentage of UDC employees hired or rejected. This is contrary to Bakr's testimony and Watson's own admissions of his participation in setting the pass-failure scores which was done after the first 200 employees were tested, including UDC applicants. After some further persistent cross-examination and evasion, he admitted:

> [Y]eah, I thought there were some good workers that weren't hired.

Kindy testified that both he and Connor were surprised at the high failure rate of the Little Rock employee applicants who were screened at Malvern. Kindy, whose judgment as a manager was highly valued by Alford, testified that in his opinion, all but two of the Little Rock employees were good workers, all of whom he had assumed had good dexterity and communication skills.

Watson testified that he did not confront Nowak or Bakr over the specifics of hiring but that he tried to stay out of it "if I could." In his 611(c) testimony, Watson sought to minimize his participation in the test formulation and scoring process. He was vague,

imprecise, and evasive when examined on this topic. He, neither then nor in later testimony for Respondent, corroborated Nowak that Bakr prevented the further lowering of the PTI passing score. He testified that "all" of the scoring was done at the same time.

As to some scores, he first testified they were "probably" devised by Bakr, his students and himself. As to other scores, he testified that he "probably" devised them with Bakr's students, and he did not "recall" Nowak's participation but Bakr was not involved. Then he testified that he probably discussed scoring of some tests with Kratz and that "maybe" Nowak, the students and himself did devise some scoring.

Watson did not deny that the ultimate time limit and penalty dexterity pass-failure scores were determined by him as Bakr testified. He admitted that Bakr had recommended that an actual job function test be used but that it was basically his, Watson's, decision to reject such test in favor of the more abstract tests devised. Watson admitted that he enlarged and added to the dexterity failure factors originally recommended by Bakr. When asked who set the cutoff scores for the combined dexterity tests, Watson responded to counsel with silence. Then, after hesitation, he answered "I'm not sure," but finally Watson admitted that he had some "input" and was "somewhat involved." He was unsure of Bakr's input. Bakr's testimony placed greater emphasis on Watson as the one who set those cutoff scores, particularly the time limits.

When he was reminded of it, Watson agreed he had been the "second in command" and actually should have known more about the dexterity tests than did Nowak but he did not know how the 6-minute time limit was arrived at. He did not know with any certainty how the NTMA cutoffs were arrived at, particularly why it was doubled in combination with the electrical test score which adversely affected, by a few points, the hiring of UDC maintenance employees, including Union President Pilcher. He

testified that he was simply told to weigh it in that manner and he assumed that it was decided on by Bakr or Nowak, or both.

Bakr testified that he did not recommend cutoff scores for the dexterity, electrical, or NTMA tests but that he agreed with Watson's time limit determinations after reading "the spread of numbers" of the first group scored as charted by Watson.

Neither Nowak nor Watson testified in contradiction of Bakr as to how it was decided to incorporate physical examinations, including back X-rays, into the testing process. According to Bakr, it had been his expressed intention to devise a practical, objective test limited only to material handlers that would require some physical effort by the employee, comparable to that actually required in their specific job function. He testified that pursuant to discussions with Nowak and Watson, he agreed to abandon such test in favor of medical physical examinations and back X-rays recommended by Nowak for all employee classifications on Nowak's representation that there would be universality of job rotation. Nowak's testimonial description of the duties of PI material handlers excludes rotation with other classifications. Watson testified that he had access to performance data of UDC employees but that he was not sure who decided not to use it for job applicant evaluation purposes. Bakr testified that he based his conclusion that such data was contaminated after consultation with Watson. However, Watson recalled no discussion at all with Bakr about the accuracy or availability of UDC employee performance records.

An attempt was made, during Watson's examination as a Respondent witness, to mitigate his 611(c) admissions as to the successful work history of UDC Malvern employees. Thus he testified that UDC "lost" the Chrysler contract and some Ford-Lincoln work. As to the latter, he testified, "we never really satisfied them." Even in direct examination, he could not explain why UDC was unable to keep to the dimensions required, i.e., was it due to employee inability or to the quality of their tools,

machinery, materials, and/or other factors? He testified that the Chrysler Quality award had been issued to UDC for that self-same customer and that it had required use of SPC.

When asked to compare SPC at UDC with PI, Watson answered in general terms that SPC had been applied at UDC in a "smaller percentage" whereas at PI "most machines have variable charting." Then, after prodding by Respondent counsel, he testified that "all" PI parts are SPC processed. When examined by Respondent counsel, he seemed visibly confused in trying to explain the differences with respect to PI machine-mounted, shot count monitors, and the verification of counts which already existed under UDC. Nowhere did he corroborate Nowak with respect to the alleged differences between UDC and PI operators' discretion to shut down the process. That is the extent of his differentiation as to SPC under both entities although he did testify as to the larger dies now at Malvern. However, according to him, size and weight of the casting are not necessarily the significant factors. Rather, it is whether the size means, as it does under PI, complexity in many products which requires a slower, more careful, methodical operation. As Thigpen pointed out, smaller but more numerous parts such as the UDC handwheels, although light in casting, required speed and operator hustling. Clearly, it is a matter of debate whether quick, constant, repetitive bodily movements for light weight castings is "easier" than slower but more methodical movements requiring closer inspection with somewhat heavier castings. Obviously, it depends on the experience as well as inherent ability and subjective preferences of the operator. Alford admitted that UDC had produced some complicated custom work.

Thigpen and Nowak were inconsistent in their testimonial evaluations of the difference in the weight of castings produced by UDC and PI. It was finally conceded by Nowak that the new custom work at Malvern involved, on the average, castings to a very great extent consist of only a few more pounds and which

were processed at a slower pace. Thigpen admitted that UDC often produced much larger and heavier castings than the proprietary handwheels which in actuality was a single casting of a multiple of handwheels. Thigpen further admitted that PI, in turn, produced many custom castings that were extremely light, i.e., under 1 pound in weight or 2 to 3 pounds on a set. Thigpen's testimonial description of the new custom work acquired by PI at Malvern was flawed by its frequent inconsistency with documentary and other evidence.

In cross-examination, Watson admitted that experience aids a die caster in the job function of inspecting a casting for defects. He admitted further that experience, overall, is the best indicator of job performance but it was not included as relevant in the testing process devised by Bakr, Nowak, and himself. He admitted that there may have been innumerable reasons why the UDC employees were unable to maintain Chrysler's dimensions and that it was possible that the Ford-Lincoln contract was eliminated because of design change. He thus contradicted Thigpen's testimony that the obvious inference was lack of employee ability.

8. Summary of PI motivational testimony of Bakr, Nowak, and Watson

Reviewing the testimony of Nowak, Watson, and Bakr, we are left with a contradictory, confusing, improbable, inconsistency-ridden account of how, when, and why a screening, testing, and test score determination process was developed by these three individuals, none of whom have had any experience in the development and application of tests for hiring employees for the functions of aluminum die casting. Dr. Bakr admitted that not only had he never constructed a screening or testing hiring procedure for any other die cast operation, but the only tests he ever constructed for employees engaged in some sort of production process were for that limited purpose of employee training, not hiring. Thus he was particularly dependent on Nowak and

Watson. In light of Bakr's actual experience, it is more reasonable to have hired him for incumbent employee retraining than for developing an open field hiring-screening process, unless the decision to develop a screening process arose unexpectedly afterward because of a factor irrelevant to his hiring.

Not only was PI's screening-testing procedure devised under the foregoing confusing circumstances, but it was done so with extreme haste no matter whose testimony one looks at. Nowak's testimony, of course, describes an almost impossible alacrity. The screening process allegedly developed by Nowak, Watson, and/or Bakr (depending on which witness is credited) was, in turn, uncritically embraced by Alford and Gaddy and immediately implemented. Alford admitted that screening-testing procedures are not projects to be engaged in without some compelling necessity, i.e., it was not a pro forma step in resuming the operation and getting a work force on the scene. As Thigpen testified, business sense requires that such screening-testing proposals must be critically evaluated. He testified that it would have made business sense to "scrutinize" Bakr's recommendations. There was no evidence that any preapplication test validation analysis or even scrutiny by Alford, Gaddy, and Keenan. Nowak testified that he quickly perused Bakr's proposed tests, which he considered "fair and objective," subject to his and Watson's modifications. No consideration was given by Gaddy nor apparently by anyone else, except Watson, Kindy, and Connor, to the extremely high failure rate. There was no investigation into or analysis of whether the screening process was in fact providing the "best" workers. By virtue of the higher passing rate of former UDC employees, Nowak's uncertainty as to how their adaptability compared to the general public should have been answered, i.e., there was a higher statistical chance that they, in fact, were more adaptable because of their admitted shorter learning curve.

According to some of the testimony, the screening process was allegedly devised by Respondent to obtain the best possible

employees. The way the tests were implemented, however, was that applicants with the highest scores were not necessarily hired. Conceivably, far fewer UDC employees might have been hired. Respondent recognized that it needed some former UDC employees to resume needed production. Respondent witnesses explained that they, therefore, first processed the UDC employees. But in processing the UDC employees first, Respondent's agents were able, at that phase in that processing, to fix and effectuate its screening and testing criteria at a point where it could control the ratio of old UDC employees to an almost infinite known supply of nonformer employees, which ultimately exceeded 1000 persons. It was necessary, of course, that the ratio be set at a point where enough of the old employees were hired to train and get operative the new inexperienced workers.

It is critical to the resolution of the issues involved here as to whether Respondent, in setting the pass-fail criteria which effectuated the hiring ratio mix, was motivated by nondiscriminatory business reasons or whether it was motivated to hire only a minority of those former employees, as was deemed necessary to carry on business, for the purpose of avoiding recognition and bargaining with the Union. To that end, the testimony of Respondent's witnesses Nowak, Watson, and Bakr must be analyzed. It is irrelevant whether those tests were good, bad, or poor tests as judged by the criteria of industrial psychology. The professional competency of Dr. Bakr is also not in issue although Respondent's perceptions of his experience and abilities may have some relevance as to why he was chosen for a task of which he had no past experience. Whether or not the tests devised were job related is not solely determinative except to the extent that aberrational, unreasonable, irrational, or false factors in the explanation of their creation and/or implementation raise inferences of pretextual and unlawful motivation. Moreover, the implementation of a nonjob-related test may be evidence of an intent to construct an employment hurdle for nonbusiness reasons. In the midst of all the contradictions and inconsistencies

in the testimony of Nowak, Watson, and Bakr as to the concoction and implementation of the screening and testing process, there is of equal significance no cogent, rational explanation as to why the pass-failure scores were set at the points which effectuated the low hiring ratio of former UDC employees and aggravated the cost and time delays necessitated in further testing of the almost inexhaustible supply of non-UDC applicants. What Bakr, Nowak, and Watson have proffered as explanations, to the extent they each may or may not have done so, is that tests and scores were determined on according to their arbitrary, subjective judgment as to what was appropriate.

E. *The Hiring Process*

The General Counsel's theory of unlawful motivation of the very imposition of a hiring screening-testing process is not necessarily dependent on whether that process is inherently discriminatory with respect to union membership nor with respect to prior UDC employment. Indeed, the prior UDC-Malvern employees were proportionally more successful surviving that process. The General Counsel's theory of unlawfully motivated screening process inception is also not dependent on whether the process was discriminatorily administered, although evidence of such would enhance the evidence of discriminatory motivation for the decision to make the process a precondition of employment. The General Counsel's theory of unlawfully motivated screening-testing process is based on the premise that the screening process was intended to, and did effectuate, an impediment or control valve by which the hiring flow of former UDC employees could be maintained at a minority level of total employees hired. The hiring process is nonetheless unlawful if the screening procedures were imposed merely in the hope that, even if untampered within its application, the high failure rate would be high enough to obtain discriminatory effect. This is so, argues the General Counsel, because the process itself would not even have been instituted had it not been for prior union repre-

sentation of the incumbent employees. An examination of the more salient features of Respondent's Malvern plant hiring procedures discloses that it did, in fact, result in an extremely high failure rate, i.e., it effectively maintained the hiring of former UDC employees to a minority level.

1. The application process

After public newspaper announcements which solicited job applications for Malvern plant openings, Plant Manager Nowak testified that on the shop floor he discussed with incumbent UDC employees the fact that they would have to file written job applications along with the general public as a necessary first step if they wanted a job at the Malvern plant. From October 13 through 15, written applications were obtained, filled out, and submitted at the Malvern Community Center, apparently located in a local bank in Malvern (and here referred to as the bank). The UDC employees were given no deference with respect to the general public except for some time off on Friday granted by Nowak.

Notices were posted at the bank which listed the classifications of jobs available and the corresponding wage rates. The initial acceptance of applications was closed as of the end of business, Saturday, October 15. Of a total 621 applications received, about 550 were for bargaining unit classifications. In is stipulated that except for Vance Wested, 84 of the former UDC unit employees who were employed by UDC on October 14, 1988, filed bargaining unit classification applications. The parties agreed to litigate whether or not Wested did file an application, the Respondent contending that it had no record of such. Uncontroverted, credible testimonial evidence established that the 9-1/2 year tenured UDC lathe operator and die cast operator did, in fact file an application which, for no accountable reason, was not acknowledged by Respondent. The record reveals that about 103 former UDC employees filed applications. Apparently, for public policy reasons, the General Coun-

sel is not alleging as discriminatees former UDC employees who failed drug abuse tests arranged by PI. The details of the drug abuse testing and how many persons failed is not disclosed.

The application form was 19 pages in length and was divided into 3 sections. The first eight-page section contained the applicant's name, address, education, work history, and necessary authorizations. The second five-page section contained a medical history questionnaire and release forms. The third six-page section consisted of a general questionnaire which elicited essay type answers.

A similar process took place at Little Rock at a local motel rented room under the aegis of Little Rock Plant Manager Roger Connor. Unlike the Malvern procedure, Connor was given complete discretion in the Little Rock plant hiring procedure. No tests or physical exams of any kind were used and Connor simply hired whom he wanted, which was virtually all of the former Little Rock UDC salaried and hourly rated employees except for a few he considered personally undesirable. Connor testified that he did so without reviewing the content of the applications except to determine the identity of the applicant.

The Malvern job applications were first scrutinized by those of the former UDC Malvern management retained by Alford, i.e., Personnel Manager Margie Kratz, Industrial Engineer David Watson, and Plant Manager Michael Nowak, the latter two who helped Dr. Bakr devise and implement the PI hiring procedures.

Alford initially reviewed the UDC personnel files of former UDC employee applicants and, by notation, flagged them for subsequent review by Kratz for such negative factors as attendance, discipline, and medical limitation. No notations were made of equivalent positive factors. Kratz testified that she reviewed the vast preponderance of those 621 applications. She testified that she had been authorized todecide on the exclusion of applicants in this first phase of the hiring process according to

criteria set forth by Nowak and/or Alford. She denied that there had been any anti-UDC employee or antiunion motivation authorized or discussed. However, she testified that the criteria she was instructed to utilize were negative factors, i.e., her function was not to ascertain the identity of desirable employees nor to ascertain their commendable qualities. Kratz' function was that of a screening agent who applied the screening-out criteria. Imposed on Kratz, in addition to that flagged by Alford above, were the following criteria. The application, including medical authorizations and releases, must be complete. She claimed that she and Nowak utilized some judgement as to whether an answer was in effect given, or a good-faith effort had been made despite apparent incompleteness. She testified that there was no fixed objective criteria to guide her judgment of "completeness." However, Nowak testified that completeness was required and he referred to no such discretion. Another negative criterion charged to Kratz was the entry of a wage rate in excess of that posted for the job. Except, arguably, for posted wage rates, employees were given no indications of intended changes in conditions of employment that existed under UDC.

Kratz testified that on Sunday, October 16, those 621 applications were reviewed and sorted into piles according to the job applied for, and that the in-depth reviews continued on Sunday or Monday. Nowak reviewed only a few groups, among which were included the maintenance classifications. Kratz testified that the UDC employee applications were not segregated as such but, because they were considered to have job-related experience, they were among the very first to be reviewed. As noted elsewhere, Nowak and Alford recognized the need for the expertise of the UDC employees to resume production as quickly as possible. Thus, if they passed the screening process, they were hired before any further higher scoring applicants were reviewed. Kratz testified that when she saw that no job was available for the first position listed as desired by the job applicant, that file was set aside and returned to as a source only

for positions that had not been filled. She testified that she arbitrarily decided not to consider the second or third choice of positions listed by the applicant. However, if an applicant listed only "any job," she made the effort to consider the applicant for the job his record indicated was most qualified. Kratz testified that she arbitrarily decided to interpret the annotation, "or any reasonable rate," to be a request for a higher than posted rate because the applicant's past history indicated a higher wage rate had been earned by the applicant.

The pace of employee hiring by PI is as follows:

As of date ending	*Total number hired including former UDC employees*	*Number of former UDC employees hired*
November 3, 1988	39	18
November 30	49	20
December 31	64	20
January 31, 1989	70	20
February 20	71	20
March 31	78	21
May 2	84	21
May 31	77	22
June 30	75	22

The initial screening by Kratz and Nowak was, for the most part, a precondition to further steps in processing, i.e., tests, physical examination, back X-rays, and final hiring. However, some testimony indicates that testing and application screening and/or physical examinations may have been done simultaneously. Eight UDC employees, one of whom had 25 years' UDC trim press experience, failed the application screening

process because they entered a higher wage rate than that posted. These include W. Clark, B.Dixson, R. Dyess, D. Eason. B. Honold, E. Mitchell, E. Nugent, and R. Turner. Several of those also indicated the alternative of "reasonable rate" or "compatible" rate. According to Kratz, 11 non-UDC applicants were rejected because they also listed an expected wage rate in excess of that posted for the job sought. Many other applicants were hired who failed to list any specific rates.

Three UDC applicants, M. Jackson, H. G. Rowland and B.White, were rejected because they failed to execute the medical release or because they failed to complete the medical questionnaire. One of those applicants had been employed by UDC for the preceding 11 years and thus the 10-year information sought by the form was already included in his UDC personnel file.

One rejected applicant, T. Bryant who had been employed by UDC for 23 years as the lead maintenance electrician, failed to respond to the question, "what industry experience have you had?" The application indicated UDC employment for 1965 to 1988, and the applicant had a total of 40 years of maintenance experience. When Nowak was questioned as to such draconian treatment, he visibly smirked and responded in a haughtily dismissive tone of voice that the applicant was apparently not proud enough of his work experience to be considered for employment. Nowak failed to testify whether the thought might have occurred to him that the applicant also suffered from presuming the interviewer to exercise common sense. Nowak exhibited a similar glib attitude in proffering justification of the elimination of UDC applicants for similar omissions or incompleteness, e.g., such omissions were evidence of a "lack of communication skills." Nowak admitted that no UDC employee had ever been reprimanded for communication skill problems, and there is no evidence that any employee communication problem had ever existed.

Six non-UDC applicants were hired despite comparable significant omissions in their applications; however in this factor as in all other categories, the non-UDC applicant had a higher failure ratio. Respondent contends that nine other UDC applicants were hired despite an arguable failure to complete the application.

Because of medical limitations listed on their employment applications, seven UDC applicants were rejected, i.e., T. Hood, H.Jackson, J. Jackson, F. Lackey, D. Malone, V. Parish, and E.Ramsey. Some of these were rejected despite the lack of relationship between the medical limitation and the position applied for, despite the past demonstrated ability of the applicant to perform the job applied for or despite the chronological remoteness of the alleged medical incident. One applicant, F. D. Thomason, was rejected in part because he "would not work in dust or smoke," whereas his application indicates just the opposite. However, that applicant was also rejected because of the desired wage rate he had entered. Thus 20 UDC applicants, many of high seniority, were rejected on the initial review of their applications, and they were not permitted to proceed to the testing stage of the screening process. Subsequent to the screening of the first group of applicants which, of course, included UDC employees, Respondent utilized the services of an independent personnel service to screen job applicants in late December 1988. Thus the hiring process had to be continued beyond 1000 applicants.

2. Testing

Bakr used a catalog that he had acquired from the Psychological Corporation as a source for the Personnel Tests for Industry (PTI), which tested in part "verbal" ability and in part numerical ability.

The tests are self-described there as follows:

VERBAL TEST

The Verbal Test is a five-minute test which utilizes a multiple-choice item approach. In each of the fifty items, the examinee selects one of four choices as the correct response to the question. Four item types are employed: synonyms, information, classification, and recognition of essentials. The questions are arranged in order of increasing difficulty; some are so easy that few applicants will fail them, others are difficult enough to challenge superior applicants for plant positions.

NUMERICAL TEST

The numerical test is a twenty-minute test in which the examinee is required to fill in the answer to each of the thirty problems. This item type has been employed as being more realistic in evaluating numerical skills for plant jobs than is the multiple-choice approach. The operations required for solving the problems include addition, subtraction, multiplication, and division; the calculation of percentages; the measurement of length, area, and volume; the manipulation of decimals and fractions; and the like. As in the Verbal Test, the problems are presented in order of increasing difficulty, from very simple to fairly challenging. The tasks are similar to those the applicant would meet in industrial situations.

The verbal portion of the test consists of 50 multiple choice definitions of words or nonrelationship of words and phrases, none of which directly relate to die casting, e.g., a horse's withers.

The numerical test contains 30 basic addition, subtraction, division, and multiplication problems, e.g., "Q. a circular path is to be placed over a 3" hole in a sheet of metal so that the patch extends 3/4" all around. The diameter of the path will be _____."

Despite the absence of justification in the accompanying manual, Bakr, amidst ongoing discussions with Nowak and Watson, decided to combine both scores and set a passing grade as described elsewhere in this decision. Despite Bakr's contention that it is unlikely that a candidate, although failing the numerical test, could compensate by a very high score in the verbal ability test and thus pass with a combined score, the results show that 13 successful applicants had a very low PTI numerical ability score ranging from 1 to 9 points.

Dr. Bakr next devised, on his own invention, a series of manual dexterity or hand-eye coordination tests which purportedly tested for speed and accuracy of hand or bodily movements. These included the "pegboard" test, i.e., insertion of equal sized short wood dowels into corresponding round holes in a flat wooden board; a sorting card test, i.e, segregating cards into piles according to the number of holes per card; and a paint test, i.e, the loading on and unloading from a "tree" of radial spokes, flat steel washers. The last such test was actually suggested by Nowak. It bears a very rough resemblance to the paint rack function where handwheels are hand mounted on a "tree" or a paint rack but with significant differences. It is clearly, and admitted by Watson, not to be an actual replication of the actual paint tree job function. Watson, who disclaimed any expertise in testing, was, according to Bakr, responsible for determining the cutoff scores for the dexterity tests by fixing the time limits and establishing penalty points for mistakes or fumbles.

As a supplement to these tests which were designed for the production employees, Bakr adopted professionally devised and published tests for the more skilled maintenance employees and toolroom employees, including tool and die makers. For these, he recommended the far more demanding National Tool and Machine Association (NTMA) battery of tests which at PI included the following tests: PTI verbal, machine shop mathematics problem solving, Bennett Mechanical Comprehension

Test, and Guilford-Zimmerman Aptitude Reasoning problem-solving tests. At Nowak's suggestion, an applied electricity test was also utilized for maintenance employees, which Nowak claimed he had drawn from an earlier applied electricity refresher course he had made optionally available to the UDC maintenance employees. Nowak rejected Bakr's recommendation of an actual blueprint reading test for toolroom employees.

The manual for the NTMA tests set forth a self-description as a "manual for the National Tooling and Machinery Association Entry Employee Selection System." Bakr testified that the NTMA tests were described there as appropriate for employees who desired to become machinists, toolmakers, tool and die makers, and mold makers. That test was a job placement test, not a hiring screening test. Bakr testified that he recommended its use for the PI classifications of die makers, die repairmen, maintenance mechanics, maintenance technicians, die cast and trim setup, machine setup, and paint setup. (In fact, it was not given to the setup positions). He conceded that PI did not fill the die makers and maintenance technician positions because of a 1-year actual PI experience requirement. He admitted that the maintenance mechanics were tested even though that position is not listed in the NTMA manual as a classification of employee to be tested.

Bakr testified that because PI had instituted what he considered to be a very lengthy written application, the oral interview called for by the NTMA manual was ignored. As noted elsewhere, Nowak Watson, and Bakr mutually disclaimed responsibility for the determination of the cutoff scores for the NTMA tests. At one point Watson testified that he merely followed the NTMA recommendation, but then he testified that he made no such suggestion to follow NTMA recommendations. Furthermore, there is no clear explanation as to who decided or why it was decided to double the NTMA scores and add to that sum the applied electricity score to determine the cutoff score for

maintenance employees. Bakr said he had nothing to do with it. Nowak testified that Bakr and Watson were responsible. In cross-examination by counsel for the General Counsel, Watson testified that Nowak and Bakr "probably" determined the NTMA cutoff scores and that the doubling of the NTMA score for maintenance applicants was done pursuant to Nowak's order. Watson testified that Nowak made the decision during a conversation between Nowak and Bakr, which was attended passively by Watson. He testified that he could not recall the rationale for that decision which he said Nowak formalized. In later cross-examination by union counsel, Watson disclaimed knowledge of who decided to double the NTMA score. He assumed it was "somehow" decided by Bakr and Nowak. Watson could not explain why the passing score was set at 45 and not 43 or 40, or any other score. He admitted that the NTMA cutoff score eliminated qualified maintenance employees. Watson was questioned about the impact of a screening-testing process whereby only 2 of 8 to 10 former UDC maintenance employees survived. He testified that yes, he voiced concern mainly by saying to Nowak, "let me out of this." He was asked about any conversation where the possibility was discussed of lowering the cutoff score just one point in order that two qualified maintenance employees might pass with a score of 44. Watson answered, "there weren't any discussions, with me." The implication is that there may have been such discussion but that his opinion was not actively addressed. One of those two scores belonged to Union President Pilcher. Another UDC maintenance applicant, C. Jordan, had a score of 42, i.e., NTMA 15 and applied electricity 12. Pilcher's 44 score consisted of NTMA 15 and applied electricity 14. In the absence of doubling the NTMA score, Pilcher would have attained a score of 29 whereas four non-UDC maintenance applicants who passed that phase of the tests achieved only 29 in two cases and 28 in two cases. The testimony of the General Counsel's witnesses is uncontradicted as to the adverse impact on work flow of nonexperienced maintenance employees actually hired by PI.

In addition to 20 UDC employees screened out by virtue of the application review process, another 27 were eliminated because of an inability to attain what Nowak, Watson, and/or Bakr (depending on which of whom is is credited) determined was the passing score for these tests. Of those, 13 failed the manual dexterity tests which required a minimum completion time score of 6 minutes and a minimum error penalty score of 10. Some of those scores were very close and, as such, brings to mind the ambiguity of the origin of these cutoff scores discussed here. Bakr, for example, testified at one point that Watson merely decided on his own experience that 6 minutes was sufficient for a competent person to finish the test.

	Minutes	*Errors*
C. Baker	7.78	
R. Ballentine	6.69	12
G. Bowman	5.82	12
W. Brooks	6.03	10
H. Burnett	6.29	(also failed PTI)
T. Cotton	7.77	(also medical)
E.L. Dial	6.11	
K. Fain	10.38	
M. Hill	6.84	(also PTI)
D. Hilligoss	7.84	13 (also medical)
V. Kelly	6.87	
S. Lackey	7.75	
S. McCollum	6.18	
B. Stewart	8.43	14 (also PTI)
K. Wallace	6.97	14
D. Womack	6.25	11 (also medical)

The PTI passing score was ultimately set at 30, but, because the UDC employees were given a 5-point bonus, they needed only 25. The PTI failures for UDC applicants were as follows:

H. Burnett	23 (also dexterity)
J. Henderson	10
M. Hill	23 (also dexterity)
L. Jones	17
E. Ollison	19
A.J. Rogers	32
B. Stewart	31 (also dexterity)
F. Turner	19
G. Zeigler	18

Although Respondent stipulated that the foregoing employees were rejected for employment because of their failing scores, there is no explanation why Rogers was rejected despite his otherwise passing PTI score. Respondent points out that had not UDC employees been given a 5-point bonus, at least about six more non-UDC applicants would have been hired, i.e., the UDC-PTI failure rate would almost have doubled. There is no explanation why the bonus was set at 5 points rather than 3, 4, 6, 7, 8, etc.

These toolroom and maintenance UDC Malvern applicant failures were stipulated to have been rejected for the following NTMA score which was 16 for toolroom classifications passing and 45, combined with the applied electricity score (AE) for maintenance passing grades:

G.T. Berryhill	NTMA 15
C. Jordan	NTMA & AE (15x2)+12=42
J. McWhorter	NTMA 13[4]
D. Pilcher	NTMA+AE (15x2)+14=44
H. Zgleszewski	NTMA 14

The toolroom classification survival rate was better for UDC applicants than that of the UDC maintenance applicants. About six passed.

About eight non-UDC applicants were hired who attained scores which had disqualified UDC applicants, one of whom, V. Polivka, was hired into shipping and receiving with a dexterity score of 7.44 and another, J. Yarborough, as a custodian with a PTI score of 18.

UDC applicants, unlike non-UDC applicants, who passed the application review and testing process, did not yet face the physical examination and back x-ray as a final condition to hiring. Instead, their personnel files again were further scrutinized. Even those who failed some of the other tests were additionally rejected on further scrutiny of their medical history as revealed in their personnel files as, noted above with respect to T.Cotton, D. Hilligoss, and D. Womack.

They were rejected for medical limitations for positions to which they did not apply. There, in addition to the 47 rejected applicants up to this point, another 4 were rejected by Kratz because of this scrutiny. Gerald Gray was rejected by Kratz because of an old lifting restriction of weights about 50 pounds although he had been actively employed as a custodian as of the

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[4]G.C. Exh. 160 is a list of scores contemporaneously compiled by Watson. It inexplicably lists a passing score of 16 for McWhorter. In his testimony, Watson was confused at first as to what constituted the passing score.

date of acquisition. Kratz rejected N.Gregory who applied for a paint racker position because of a past medical limitation as to two machine operator positions. Gregory had been a paint racker actively employed since 1966. Kratz rejected J.Hardy's application for an automatic lathe operator position because of a personnel file medical limitation relating to certain setup work not within the secondary classification for which she applied. Hardy had been actively employed on that automatic lathe for the 2 years preceding the acquisition. Hardy had listed supply room attendant as her fourth desired position. Kratz admitted that if Hardy had listed it as the first desired position, she would have have been hired. Finally, Kratz rejected M. McCollum who had applied for the light machine operator job known as the "tapper." McCollum had also performed a variety of other jobs but had a medical limitation for the unrelated job of paint racker and trim press operator.

3. Medical examination

All of the UDC applicants who had successfully proceeded to the final screening process hurdle passed the physical examinations to which they submitted except for eight who failed the last step of that examination, the back x-ray. These were:

W. Burroughs	L. McDougal
G. Deimel	A. Love
M. Dial	C. Westphall
C. Diffee	P. Wilson

All were actively employed up to the October 14 closure. The General Counsel does not seek a reinstatement or backpay remedy for Deimel, because of a history of disability by the Social Security Administration at the time of his application, but does seek any other monetary remedial order that might be granted, i.e., pension benefits. None of the medical information disclosed by way of those X-rays was known to Respondent prior to such disclosure by x-ray.

In addition to the above-discussed 59 rejected Malvern plant UDC employees (excluding Wested), there are 2 alleged discriminatees who had applied for PI tool and die maker positions and who had passed the NTMA tests, but who were never notified by Respondent to take a physical examination and were thus never hired. Both of these applicants were union officers and were two of seven UDC tool and die makers. By virtue of their test scores, they became available for employment as of October 26, 1988. PI initially hired two former UDC tool and die makers, W.Ritter on October 26 and J.Selph on November 1, who passed the screening process. Kratz and Nowak are inconsistent as to PI's need additional tool and die makers. Although Nowak testified that Respondent PI subcontracted tool and die work, he admitted that it continued to solicit employment for these positions after October26 and as of September 1990. A job order for tool and die makers was placed with the C&S Personnel Agency by PI on January23, 1989. This impeaches Kratz' testimony that PI had ceased searching for tool and die makers in the fall of 1988 and winter of 1989. No tool and die maker was hired until March 29, 1989, when former UDC tool and die maker L.Kisner was hired.

4. Testing evidence analysis

It is clear from the foregoing review of the screening procedure at Malvern as to how it was devised and how it was applied, that even disregarding the aspect of possible inherent discrimination against incumbent employees, it was a process, by its nature, reasonably expected to effectuate a high failure rate. The evidence that compels such conclusion, inter alia, includes the stringent draconian, sometimes arbitrary, application review process, the generality of the tests that were constructed that were calculated to effectuate a level playing field not directly related to actual die casting job functions, the arbitrariness of and manipulation of passing PTI scores after the tests were taken which enabled Respondent to arbitrarily control the ratio of

UDC and non-UDC applicants hired, the modification and expansiveness of the tests contributed by Nowak for the proffered reasons of a widespread allegedly expected job rotation system which did not occur for the job handler position for which Bakr limited his first recommendation, the similar arbitrary manipulation and application of NTMA and AE scores, the additional posttest scrutiny of personnel files of UDC applicants and the inexplicable failure to hire applicants who passed the tests, including two union officers (a third, the Union's president, having been manipulated out of hiring) and the expectation and recognition, by at least Watson, that a high number of qualified persons were going to be screened out by these arbitrary standards. In view of my findings below, it is unnecessary to evaluate whether the tests were actually discriminatorily constructed or applied. It is sufficient to find that they were calculated to be, and were in fact, applied as a high failure rate screening process which served as a control valve for the percentage of former UDC employees hired by PI at Malvern plant.

F. *Conclusions*

1. General Counsel's burden of proof

The Board and reviewing courts have recognized that in this sophisticated, complex industrialized society, it is often extremely difficult to ascertain motivational causation. The evidence of such is virtually within the control and frequently in the mind of the decision maker whose decisions adversely impact on lawfully protected interests. The proverbial "smoking gun" is a rarity, and prosecutions more frequently are premised on circumstantial evidence on which inferences can be made. Accordingly, the Board, with higher Court approval, has determined on the evidentiary burden of proof as explicated in *Wright Line*, 251 NLRB 1083 (1980), and approved by the Supreme Court in *Transportation Management Corp.*, 462 U.S. 393 (1983). In that case, the Board addressed itself to the issue of mixed motivation,

i.e., where, as is so often the situation, there exists evidence that a respondent employer was in part motivated by nondiscriminatory business motivations and, in part, by motivations discriminatory under the Act. The Board in that case held that, henceforth, in all such mixed motivation cases, it would place the burden on the General Counsel to come forward with evidence that was sufficient to demonstrate that at least, in part, the respondent was discriminatorily motivated. If the General Counsel meets that burden, the Board held, with subsequent Court approval, that the respondent must thereupon assume the burden of proving that regardless of the presence of unlawful motivation, it would have necessarily engaged in the same decisional conduct because of other lawful nondiscriminatory reasons. The *Wright Line* burden of proof on the General Counsel may be sustained with evidence short of direct evidence of motivation, i.e., inferential evidence arising from a variety of factors, i.e., union animus, timing, pretext, etc.

Because the Board has adopted the *Wright Line* evidentiary rule with respect to mixed motivation cases, it did not preclude the possibility that the General Counsel could sustain his case by proving that the proffered alleged business reason for the adverse action was entirely false and pretextual, i.e., there was no mixed motivation at all. Thus it may be found that where the Respondent's proffered nondiscriminatory motivational explanation is so consummately false, even in the absence of direct evidence of knowledge of and animus toward the protected activity, the trier of fact is constrained to infer unlawful motivation. *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966). The Board, however, often construes the record which discloses such falsity of proffered explanation as in the nature of a respondent having failed to meet its *Wright Line* burden of proof. However, the Board has recently made it clear that it adheres to the *Shattuck Denn* rationale as it has stated in a case of falsity of defense:

> The Board is entitled to infer that the Respondent's true motive was unlawful, i.e., because of the [discriminatee's] protected activity.

See *Williams Contracting*, 309 NLRB 433 (1992).

Disregarding for the moment the proffered direct evidence of unlawful motivation, and considering the Respondent's witnesses' testimony as 611(c) witnesses or otherwise, we are confronted with an astonishing body of inconsistences, contradictions, improbabilities, and aberrational and shifting explanations that are so gross as to permit no room for any conclusion other than that such testimony was the product of deliberate mendacity or a total malfunction of all of the Respondent witnesses' recollective capacities. I conclude that such testimony necessarily compels the conclusion that Respondent's true motivation for implementing any kind of a screening-testing-physical examination procedure at the Malvern plant in the fall of 1989 was unlawful, i.e., discriminatory under the Act. I conclude in the words of Nowak which he applied to some unsatisfactory incomplete employee job applications: "They must be hiding something." I further find that the General Counsel has proven by virtue of such evidence that Respondent was possessed of no other nondiscriminatory motivation and that all references thereto by Respondent's agents are false and pretextual.

Respondent argues in the brief that such interpretation of the General Counsel's burden of proof which does not oblige it to prove the specific unlawful motivation, i.e., discrimination because of the incumbent employees' union representation, is unconstitutional. Implicit in this argument is that, after all, there are various other unlawful discriminatory motivations, i.e., age, sex, etc., of which an employer might have been possessed. Certainly, possible age discrimination motivations were not litigated in this proceeding although Respondent, while not claiming age discrimination as a defense, elicited in cross-

examination of the General Counsel's expert witness, Dr. Sylvia Joure, an effort by her to evaluate the adverse affect, peculiar to older persons of whom the Malvern UDC employees had a large proportion, of any testing.

It is not necessary to address the constitutional issue in the *Shattuck Denn* analysis because I find alternatively that the General Counsel has proven by direct evidence of unlawful discriminatory motivation under the Act as Respondent's sole motivation. I do so because the total failure of Respondent's witnesses' credibility impels me to credit the otherwise vulnerable testimony of Connor and Key. As previously noted, their revenge-motivated bias is counterbalanced by Respondent's witnesses' economic interests. Connor and Key's alleged duplicitous business practices's duplicitous treatment of Connor, and Alford's admissions to his own and Gaddy's deception in business dealings. Connor and Key's inconsistencies and contradictions do not run to the essential substances of which they claim transpired or to essentially what was said, as do the very basic contradiction of Respondent's witnesses. The latter are contradictions of substance. Also, as noted above, Nowak's total lack of credibility and his failure to effectively contradict Connor or Key necessitates that I credit their testimony wherever it is inconsistent with his. Having concluded thus, I find Nowak to be such an unreliable witness that I credit any testimony of General Counsel's witnesses that may be inconsistent with Nowak. Having done so, I must credit Connor and Key's account of their conversations with other Respondent agents, as it is in accord with the damaging statements made to them by Nowak.

Where there are inconsistencies between Connor and Key as to dates, I credit Connor as the more reliable. With respect to the specific form or verbiage of Respondent agents' communications to them, I find Connor to be the more reliable except as to the airplane conversation. Although Connor was probably more

accurate as to the context of how Alford explained to Key the Malvern screening process on that air trip, I find that in light of Connor's testimony in cross-examination which, in effect, affirmed his pretrial affidavit testimony, that Alford did go one step further and stated to Key that the purpose of the Malvern screening process was to avoid union recognition and bargaining. I, therefore, find that, in fact, there was an objective statement made by Alford to Key, which, in accurate interpretation, meant that the purpose of the Malvern screening procedure was to "get rid of the Union," i.e., to avoid union representation.

In addition to foregoing direct admission of unlawful motivation, Connor's own individual conversations with Alford reveal admissions of unlawful motivation. Alford's allusions to the relevance of the hiring ratio to the bargaining obligation and his lack of any reference to product mix, statistical process control, UDC employees' abilities, etc., were made in the context of conversations wherein Alford explained to Connor the need for the disruptive, expensive protracted hiring process at the Malvern plant. Subsequent so-called disclaimers in the presence of others prefaced by "we didn't say that," "we will deny it," etc., seem to have been clothed in the phraseology and manner of a disclaimer for public consumption accompanied by an implied "wink and nod." They were not convincing to Connor, who persisted with his hectoring accusations, and they did not ring true to this trier of fact.

Alford's explanation to Connor never included those business motivations proffered at trial. I discredit Gaddy's generalized testimony that he did so, as it contradicts not only Connor but Alford. Thus there is sufficient evidence on which to conclude that the proffered business reasons for the Malvern screening process were totally false and pretextual. However, assuming for argument's sake that it has only been proven that unlawful discrimination was but one of a mixed motivational decision, we have no further to look than at Nowak's admissions to Connor,

and Alford's joint explanation to Connor and Key, to settle the issue. According to Nowak, a running count of the hiring ratio was being taken and an at a hiring ratio that could preclude bargaining. Neither Nowak nor Alford made any reference to Connor and Key of any business motivation for a screening process that had been reluctantly instituted and which, by the necessity of temporary closure, would jeopardize commitments to customers. The testimony of Connor, Key, and Alford clearly reveal that it had been the original intent of Keenan and Gaddy not to institute any screening process and not to have had any hiatus in operations. The only way to have avoided such hiatus was to have immediately employed the incumbent UDC Malvern plant employees, as had been done in Little Rock, and to train, if necessary, and evaluate their performance as new work filtered in.

The testimony of Connor and Key, understood in the context of Respondent's witnesses own dissembling, necessarily coerces the conclusion that the proffered business reasons were totally false, pretextual, and contrived partly, even after the investigation of this case but prior to trial, with a hindsight retroactive presentation of what might have been good, sound business reasons for screening the UDC Malvern employees. It is unnecessary to decide which of the variations of Respondent's explanations is correct, i.e., UDC employees were not pro forma reinstated because of Nowak's disparagement of their and his and/or Baker's subsequent recommendation for testing, or that the screening, testing, and physical examinations were determined on well prior to any communications with the Malvern UDC plant union-animus ridden management regarding the capabilities of the UDC Malvern employees. Under the first variation, Respondent inherits the union animus of Nowak, his concocted, contrived explanations of devising and applying the testing and his manipulated scoring and the contradictions of Bakr and Watson. In the second variation, Respondent made the decision without any reasons for doing so, yet in the absence of

any policy, practice, or mind-set against pro forma hiring of incumbent employees as had been intended at "I" and its other acquisitions. Either theory is damned by contradictions and evidence of a single unlawful motivation.

I have made my finding that the General Counsel has proven with a preponderance of evidence that Respondent had only one unlawful motivation for the hiring of Malvern UDC employees conditioned on the survival of a hiring process. However, I will briefly analyze the evidence from the assumption that only a mixed motivation has been established to determine whether there is any basis upon which to find that Respondent would have, for nondiscriminatory business reasons, refused to continue the ongoing employment of the UDC Malvern plant employees and to subject them to a screening-testing-medical examination process as a condition precedent to employment.

2. Respondent's burden of proof

Respondent has adduced a massive record, which was presumably intended to rebut the General Counsel's evidence that would support an inference of unlawful motivation by reason of the nature of the screening process itself and its application. This, of course, was the General Counsel's alternative theory of prosecution which proceeds on the assumption that direct evidence of unlawful motivation might fail, which it had not. Thus the General Counsel raised a barrage of evidence which it was claimed would disclose the aberrational or irrational, nonjob-related nature of the screening process on which an inference of unlawful motivation could be raised. Thus the General Counsel adduced the testimony of Industrial Psychologist Dr. Sylvia Joure of Memphis, Tennessee, for the purpose of establishing the nonjob relatedness and/or invalidity of the testing process constructed by Dr. Bakr. It is unnecessary for me to even consider her testimony nor to pass judgment on either her or Dr. Bakr's competency in their respective disciplines. i.e., industrial psychology vis-a-vis industrial engineering as it relates to the hiring

process. I do note that she did not testify, as the General Counsel asserts, that those tests were in fact invalid. What she did testify to was that there had been no showing of test validity under industrial psychology norms as she recognizes them.

The Respondent therefore attempted to adduce evidence to establish that many of the things that it had done, alone or in conjunction with Dr. Bakr, were, in fact, reasonable or at least not unreasonable. Much of that evidence is unnecessary. Of course, it is not inherently unreasonable to use employment application forms, nor to utilize a testing-screening procedure even in a plant acquisition, nor to subject employees to physical examinations nor to refuse to employ persons because of physical conditions ascertained before or after a physical examination. As I had reiterated so many times during the course of the trial in an attempt to curtail unnecessary litigation, the issue is motivation, i.e., motivation of Respondent within its own peculiar fact context.

The Respondent's perception of its obligation of *Wright Line* appears to be that if it can be shown that had Respondent not been unlawfully motivated, it could have been motivated for business reasons because such business reasons exited in the abstract and could have been employed. However, it is not sufficient to demonstrate that an almost infinite variety of possible nondiscriminatory reasons existed and were available, in retrospect, to the Respondent. It must be shown and demonstrated with preponderant evidence that Respondent at the time actually was aware of those reasons and at the time actually acted because of those business reasons and would have acted the same way even in the absence of a partial unlawful motivation. Respondent is not permitted to escape culpability simply by demonstrating that other business reasons might have been available to Respondent at the time of the decisional process. A review of those alleged nondiscriminatory business reasons fails to establish with a preponderance of evidence that they would have, in the absence

of unlawful motivation, inevitably and necessarily led to the establishment of the Malvern plant screening process.

The analysis of evidence of Respondent's motivation above has shown that Respondent failed to establish with evidence of any credibility that it had decided on an obligatory screening process because of its planned changes in the product mix at the Malvern plant, because of some prepurchase policy decision to do so, because of information or doubts of the incumbent employees' abilities, or because of the sole recommendation of an independent industrial engineer.

Assuming that Nowak is credited (which he is not) that he expressed his opinions as to certain aspects of Malvern employees' lack of experience and that they somehow motivated, retroactively through some extrasensory process, the decision to screen-test-physically examine and x-ray job applicants, there is a failure of proof that this process was constructed for or did in fact achieve its various purported objectives, i.e., SPC competent workers, workers with a "short learning curve," "the best workers" or the "best possible workers," or "appropriate" workers, or "competent" workers.

As noted above, there was no explicit discussion of SPC with Nowak prior to the acquisition. That process emerged from a testimonial fog much later on. There is no credible evidence that the tests were specifically designed for nor were able to identify specific SPC skills. There is a failure of of evidence that the screening process overall actually identified the "best possible workers" for custom aluminum die casting. There is abundant evidence that PI at Malvern acquired a somewhat higher ratio of custom die casting work, much of which resulted in a higher mix of heavy and/or multifaceted castings. But the acquisition of such work was gradual in nature and not entirely unique, and it was admitted by Thigpen that a very large proportion of it was attributable to the Skil account which did not require detailed machining of the casting. The evidence supports a finding that

the screening and testing were reasonably expected to identify persons with certain general mental and physical abilities. But the evidence does not establish that it necessarily identified the precise skills required for custom die castings or SPC, nor that it did so in such a manner that it did not screen out persons who, despite the lack of generalized qualities identified by the screening, were perfectly capable of being the best available custom aluminum die cast workers at Malvern, Arkansas, especially so because of past experience.

The Respondent adduced evidence of the reasonableness of its screening procedure to identify certain general attitudes and qualities of employees on which it would presume success in the SPC process. It failed to adduce evidence that the SPC process necessarily mandates or even suggests that an incumbent work force of an acquired business must be subjected to an open employment hiring process rather than be retained and retrained to achieve an overlayment of new skills on old employee skills demonstrated by experience as described by Respondent's own expert, Warner Baxter. It is insufficient for Respondent to merely establish the retrospective reasonableness of its hiring decisions.

Assuming, which I do not find to be fact, that Nowak timely raised concerns about employee sanding abilities, the Respondent failed to demonstrate that the screening process addressed itself to that rather simplistic task. Moreover, Respondent failed to demonstrate what basis there was for Nowak's conclusion that employees who had been doing one kind of sanding might not be able to do another simple kind of sanding, even assuming that it was cosmetic and required more care. In any event, Nowak's credibility, like Alford, Gaddy, and Watson, was impeached, and his explanations are of no probative value in any event.

With respect to medical screening and physical examination and back X-rays, the evidence disclosed that it had been implemented as an integral part of an unlawfully motivated employ-

ment screening process, i.e., the employees of UDC would have simply been retained at their jobs to maintain ongoing production needs as Respondent intended to do at "I" and which it did at its other acquisitions. Respondent failed to prove that it had any prepurchase business motivated policy practice or mind-set to institute medical screening, physical examinations, and back X-rays; assuming again that Nowak and Watson, to the extent they admit any involvement, are credible witnesses with respect to the subject of planned employee rotation of job function (which testimony I discredit) and its relevance to the screening-testing-physical examination process.

There is a failure of evidence that the planned and actual rotation of employees was such as to necessitate the expansiveness of the screening, testing, and physical examinations over the initial recommendations of Dr. Bakr. There had previously been UDC job interchange and UDC cross-training, and the new work process described by Nowak, Watson, and/or Thigpen in their testimony fail to demonstrate the purported universality of postacquisition job rotation. The physical examinations and concomitant back X-rays were the result of Nowak's recommendation to expand on the very limited recommendation of Dr. Bakr for a simple physical test for material handlers, whose job, he was told, would be subject to rotation. There is a failure of credible evidence that such did in fact occur at PI. Thus the explanation for the idea of physical ability screening, physical examinations, and back X-rays were not proven to be the result of an objective consideration and discussion by the test constructors in relation to known existence of actual physical disabilities. It was rather an integral part of hiring process which was instituted for unlawful motivation and was not shown to have been instituted for any other nondiscriminatory reason. As such, it was, therefore, discriminatorily motivated and would not have been instituted except for the fact that it was part of the discriminatorily motivated screening process. Had the physical screening, examination, and x-ray process not been employed,

UDC applicants who had been actively employed by UDC up to closure would have been hired by PI, and it is a matter of conjecture whether any subsequently discovered physical problem would have interfered with their ability to remain actively employed. Evidence of physical problems of certain UDC applicants adduced by Respondent in consequence of an unlawfully motivated examination cannot retroactively support a decision made in ignorance of those conditions.

I therefore find that the Respondent refused to hire those 62 former Malvern UDC employees because they had been represented by the Union, and their hiring by PI was feared to have necessitated recognition and bargaining with the Union and thus violated Section (8)(a)(1) and (3) of the Act as alleged in the amended complaint.

3. PI operations at Malvern as successor to UDC

Although the Respondent adduced evidence of changes in work flow and product mix at the Malvern plant, its expressed purpose for that proffer is directed to the justification of the need for employees of greater adaptability and skills which, in turn, purportedly warranted the in-depth screening-testing-medical examination process instituted by PI on its acquisition of the UDC Malvern plant. As noted elsewhere, I find those proffered justifications to have been false and pretextuous. The changes effectuated by PI, however, have another significance, assuming no change in employee complement. If those other changes are substantial enough, the nature of the employing industry would not be the same, and new conditions of employment would be such as to cause the employees to view their jobs as essentially altered, so as to impact their attitude toward continued union representation. *NLRB v. Burns*, 406 U.S. 2872 (1972); *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973); *Love's Barbeque Restaurant*, 245 NLRB 78 (1979), enfd. in relevant part sub. nom. *Kallman v. NLRB*, 640 F.2d 1094 (9th Cir. 1981); *U.S. Marine Corp.*, 293 NLRB 669 (1989), enfd. 916 F.2d 1183 (7th

Cir. 1991); *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987). If the changes are not substantial and a majority of former employees were hired, or would have been hired but for discriminatory reasons, then the employing industry remains the same and successor employer relationship exists under which arises the obligation to recognize and bargain with the predecessor employees' designated collective-bargaining representative. *Love's Barbeque Restaurant, supra*; *Shortway Suburban Lines*, 286 NLRB 323 (1987), enfd. 862 F.2d 309 (3d Cir. 1988); *State Distributing Co.*, 282 NLRB 1048 (1987).

After the acquisition of the totality of UDC assets, PI resumed its production at Malvern as soon as a sufficient number of employees survived the screening process. As found elsewhere, that resumption was delayed and production commitments were disrupted because of the inability of the hiring process to produce enough personnel. Furthermore, production was only possible even at that delayed rate because about 20 of the former 103 UDC employees managed to qualify.

The employees hired worked for the same supervisors, quality control personnel and other salaried personnel and managers as had the UDC employees. They immediately worked in the same plant with the same machinery and tools and continued with the production necessary to satisfy UDC customers assumed by PI, with the exception of one account worth $ 146,000 in the period July 1, 1987, to October 14, 1988, which was transferred to the Pace Harrison plant.

Pursuant to the preacquisition consultations with Industrial Engineer Dr. Bakr, the flow of work was altered by the rearrangement and relocation of certain machines to effectuate greater expediency on the shop floor. In January and February, minor structural changes accommodated an expanded tool room and office space.

PI continued on thereafter as UDC had, in the same or very similar basic production functions of aluminum die casting. The same basic functions were carried on by die cast machine operators, tool and die makers, operators of trim presses, tappers, lathes and wheelabrators, painters, packers, inspectors, set up workers, furnace tenders, shopping and receiving department workers, supply room workers, maintenance employees and custodians. As concluded elsewhere, the duties of PI employees witnessed an evolutionary and gradual change only to the extent that newer products were acquired, and the charting, graphing, and quality control functions of plantwide SPC were taught and applied.

New equipment, including such production monitoring devices as the spectrograph, was also a matter of gradual acquisition through the spring and summer of 1989. As late as September 1990, Nowak testified that work flowing through the paint room remained 50-percent proprietary. As of that date, PI employees had run no part over 18 pounds, and the 18-pound part run was, itself, only a 2-month run of a lighting fixture housing. The next heaviest part run was 10 pounds, but the overall average was 4 pounds of which, with excess metal or flash removal, amounted to 7-8 pounds and 2-3 pounds, respectively. Thus, neither the acquisition of new work nor the transfer of heavier die casting machine production from Little Rock in February 1989 dramatically affected the weight of castings processed in the Malvern plant. The small handwheels were not cast individually but, rather, were found in large sets of many handwheels connected by excess metal. Somewhat heavier new products of a more complicated, multifaceted nature than handwheels (but not totally different from some UDC custom work) required a slower but more careful work effort, but the bodily movements, general hand-eye coordination, visual observation, and mental judgmental functions were generically and essentially the same, albeit more demanding in some casting configurations according to testimonial admissions of Respondent witnesses, and

testimony of employee witnesses whom I find more reliable than that of Respondent's witnesses for reasons stated elsewhere in this decision.

If modernization of plant, addition of more rigorous quality control, and acquisition of more responsible, complicated but essentially the same general type of labor required product line can terminate a bargaining relationship in an otherwise successor employer of a majority of the same employees, what would be the justification to presume a continued obligatory bargaining relationship in business or industries where the employer and employees remain the same but where such changes are ongoing constantly in a competitive industrialized society, e.g., the automobile and what is left of high tech and electronics industry? *Compare Morton Development Corp.*, 299 NLRB 649 (1990), where a drastic change from an operation of a health care facility for a young population of retarded persons of hyperactive characteristics to a nursing home for sedentary, aged, often comatose persons, after a 4-month hiatus and physical changes in the building, was deemed insufficient to warrant withdrawal of recognition by the same owner-operator. There is no rational basis to distinguish a successorship situation where such changes are gradually ongoing but where they are caused by a new ownership under the form of asset purchase rather than stock purchase.

In the instant case, at what point after PI's acquisition and continuation of the UDC business can it be said that there had been sufficient change in actual product mix and quality control processes that PI ceased to be a successor and/or the changes were so impactive that it could not be presumed that the employees desired union representation? The facts found here disclosed that PI would have continued in place the entire complement of former UDC employees had it not been for the fear that it might have had to recognize and bargain with the Union. PI would have, therefore, continued with the exact same operations of

UDC, serving the same customers, until a subsequent time when new and/or more complicated product lines could be acquired. Thus PI would have become overnight UDC but with a different name, ownership, and top corporate management. No significant changes would have occurred until well after a majority or at least representative complement of PI's ultimate Malvern plant production and maintenance employees had been hired in late December and early January. Compare *Aquabrom, Inc.*, 280 NLRB 1131, 1133 (1986), enfd. 855 F.2d 1174 (6th Cir. 1988). In any event, the difference in product mix and all other changes effectuated by PI did not change the eventual nature of the work performed, how it was performed, the general market served, the general nature of machines and tools used, nor were they of such a nature as to diminish the employees' perspective that there was a "substantial continuity" between UDC and PI. *Capitol Steel & Iron Co.*, 299 NLRB 484 (1990).

Respondent may not, by bootstrap argument, rely on job rotation or other unilateral changes in working conditions to support a conclusion that the employing industry has so substantially changed to have disrupted the employee-union relationship. The Supreme Court in *Burns, supra*, did observe that an otherwise successor employer is free to set initial wages and terms and conditions of employment on which it intends to offer those persons it ultimately hired, except where "it is perfectly clear that the new employer plans to retain all of the employees in the unit" and therefore must first consult with the employees' bargaining representative before changing old wage rates and terms and conditions of employment. The Board holds, accordingly, that where the successor employer would have hired the predecessor's employees but for their representation by a union, it may not lawfully unilaterally set the initial terms on which it will hire those employees. *Shortway Suburban Lines, supra*; *State Distributing Co., supra*; *Love's Barbeque Restaurant, supra*; *Systems Management*, 292 NLRB 1078 (1989), enfd. in relevant part but remanded as to the remedial order 901 F.2d 297

(3d Cir. 1990); *Honda of Hayward*, 307 NLRB 340 (1992). As found in this decision, Respondent would have hired all of the UDC discriminatees, except for unlawful discriminatory motivations, and did not clearly tell them in advance that they would be hired only on condition of their acceptance of predetermined changes in their conditions of employment. Accordingly, it would have had to notify and bargain with their collective-bargaining representative with respect to changes in wages, hours, and other preexisting terms and conditions of employment.

On the facts in this record, I find that Respondent PI was a successor employer and, as such, was under the obligation to notify and bargain with the Union as to changes in wages, hours, terms, and conditions of employment. There is no dispute that Respondent unilaterally and without notice effectuated changes in those conditions of employment of the Malvern plant employees as alleged in the complaint. It did so at a time when it was aware that the Union had represented UDC Malvern plant employees up to the time of closure. Respondent may not now claim that the Union did not officially demand recognition. Its calculated effort to destroy the representational status of the Union by virtue of an unlawful hiring process rendered any such effort a futility. Moreover, but for the discriminatory hiring procedure, the Union's presumption of majority status would have continued inasmuch as PI would have continued the employment of bargaining unit employees, whether active or temporarily laid off, including the 84 former employee applicants who were stipulated to have been employed by UDC on October 14, 1988. Testimony as to 35 "active" employees at closure is meaningless, and all doubts of hiring intentions must be resolved against Respondent. *Love's Barbeque Restaurant, supra*; and *Honda of Hayward, supra*; *State Distribution Co., supra*; *Freemont Ford Sales*, 289 NLRB 1290, 1295 (1988).

Respondent's reliance on *Freemont* is misplaced. There, the Board explicitly adopted the "but for" successorship analysis but

went on to discuss an alternative "representative complement" theory of successorship relied on by the judge for whom the facts of the case found "problematic" sufficient continuity of employee complement. Accordingly, the judge specifically found that a "substantial and representative complement" of employees existed on a certain date and that an ensuing obligation arose and was met by the labor organization to demand recognition. The instant case is governed not by a "representative complement" theory of bargaining obligation but, rather, the "but for" theory adopted by the Board in *Freemont*, i.e., but for the unlawful discrimination, a majority of UDC's union-represented employees would have been employed without any hiatus and without any screening process on the immediate continuation of UDC's operations by PI in October 1988, and the bargaining obligation continued with the Union's presumed majority status.

Respondent's PI's business records reflect correspondence from a law firm representing it to the union attorney dated February 20, 1989. That letter alluded to the union attorney's prior letter of February 7 questioning PI's changes in the Malvern plant retirement income plan. It is recited there that PI disclaimed obligation to bargain with the Union concerning any conditions of employment at the Malvern plant. Thus PI recognized and understood prior union communication to be a demand for recognition and bargaining, which it refused. In any event, the union attorney, Deborah Jeon, by letter dated May 2, 1989, reiterated that demand. By both dates, Respondent maintained a "representative complement" but was still in the process of changing its product mix and evolving its SPC program. However, the Union was under no obligation to demand recognition because its majority status would have continued, and the burden was on Respondent to notify it and provide opportunity for negotiating changes in employment conditions. By failing to do so on the very first unilateral change, Respondent failed to recognize and bargain with the Union as employee bargaining

agent and thus violated Section 8(a)(1) and (5) of the Act. The undisputed evidence reveals that on the very first employment of employees in former bargaining positions, PI changed not only wage rates but also health and life insurance, pension benefit plans, job classifications, and subcontracted bargaining unit work while it struggled to attain a sufficient employee complement.

4. The Little Rock alleged discriminatees

In February 1989, the Little Rock employees commenced filing job applications at the Malvern plant. Half of those 45-50 employees failed a drug abuse test. Apparently, for public policy reasons, the General Counsel alleges no drug abuse test-failed applicant as a discriminatee at either plant. Of the remaining applicants, between 5 and 7 qualified for transfer, only 3 actually transferred and 16 are alleged as discriminatees. The General Counsel's theory of violation is that they, as innocent victims, suffered adversely by being subjected to the discriminatory Malvern hiring process as an act of concealment of unlawful motivation. The General Counsel cites *Howard Johnson Co.*, 207 NLRB 1122, 1123 (1974); and *Dawson Carbide Industries*, 273 NLRB 382, 389 (1984), enfd. 782 F.2d 64 (6th Cir. 1986).

The General Counsel's theory assumes that those 16 Little Rock employees would have been hired at Malvern in the absence of the discriminatory hiring practice there. However, the finding here is that the former UDC Malvern plant employees would have been hired intact on acquisition of UDC's ongoing business but for the unlawful discriminatory motivation. The remedial order sought by the General Counsel of reinstatement of 62 UDC Malvern plant discriminatees precludes a remedial order for any Little Rock discriminatees. In the absence of the unlawful hiring procedure, not only would 84 former UDC Malvern plant employees, including 62 discriminatees, had been employed, either actively or on temporary layoff in February 1989, but also all other former UDC Malvern plant employees of

a total of 103, who applied for jobs there but who were not alleged as discriminatees.

In view of undisputed testimony and stipulations in the record that the Little Rock plant was closed for reasons not alleged to be discriminatory nor an act of concealment of discriminatory motivations, I cannot find that the nonemployment of Little Rock employees at Malvern was not causally related to the unfair labor practices there. According, I find no merit to the Little Rock plant allegations in the amended complaint.

CONCLUSIONS OF LAW

1. Respondent Pace Industries, d/b/a Precision Industries, Inc., Pace Industries, Inc., Pace Industries, Inc., d/b/a General Precision Tool & Die, Inc., Pace Industries, Inc., d/b/a Automatic Castings, Inc. is a single employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) is a labor organization within the meaning of Section 2(5) of the Act.

3. For 20 years or more prior to October 14, 1988, and at all times material, the Union has been and is the exclusive collective-bargaining representative by virtue of Section 9(b) of the Act for purposes of rates of pay, wages, hours of employment, and other terms and conditions of employment for employees in the following appropriate unit:

> All production and maintenance employees, including leaders and truck drivers employed at Respondent's Malvern, Arkansas plant, but excluding direct representatives of management, such as executives and superintendents, office and clerical employees, engineers, timestudy men, draftsmen, laboratory employees, cafeteria help, professional employees, timekeepers, guards, First Aid employ-

ees, foremen and other supervisory employees as defined in the Act.

4. By refusing on and after October 1988 to hire employees formerly employed by Universal Die Casting, Inc. because those employees were represented by the Union, and in order to avoid recognition and bargaining with the Union, Respondent has violated Section 8(a)(1) and (3) of the Act.

5. By refusing on and after October 14, 1988, to recognize and bargain with the Union as the collective-bargaining representative of its employees employed in the aforesaid unit, Respondent has violated Section 8(a)(1) and (5) of the Act.

6. By on and after October 14, 1988, unilaterally changing the preexisting conditions of employment of its bargaining unit employees without prior notification to and bargaining with the Union, Respondent has violated Section 8(a)(1) and (5) of the Act.

7. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

8. Except as specifically found here, Respondent has not violated the Act as alleged in the amended complaint.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices in violation of Section 8(a)(1), (2), (3,) and (5) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the Act, of which the restoration of the status quo ante is essential. Cf. *Freemont Ford, supra.*

I shall recommend that Respondent offer to the unit employees formerly employed by Universal Die Casting, Inc., at Malvern, Arkansas, listed below, to whom it did not offer employment, immediate and full employment without prejudice to their se-

niority and other rights previously enjoyed, discharging if necessary any employees hired in their place.

Baker, Charline W.
Ballentine, Ronnie T.
Berryhill, G. Tom
Berryhill, Marvin
Bowman, Gerald F.
Brooks, Willie
Burnett, Henry R.
Burroughs, Willene
Bryant, Tom H.
Clark, William
Cotton, Treva R.
Dial, Elsie Lee
Dial, Marvin
Diffee, Carrol C.
Dixson, Bill B.
Dyess, Rita
Eason, Doss A.
Fain, Kent
Gray, Gerald E.
Gregory, Naydean C.
Hardy, Joy G.
Henderson, Jimmie A.
Hill, G. Dexter
Hill, Maude
Hilligoss, Dick O.
Honold, Brenda J.
Hood, Theresa
Jackson, Henry A.
Jackson, Jimmie F.
Jackson, Michael D.
Jones, Laura
Jordan, Charles W.
Kelly, Velma M.
Lackey, Frances E.
Lackey, Smitty
Lowe, Allen
McCollum, Maude H.
McCollum, Stella P.
McDougal, Larry D.
McWhorter, Jackie L.
Malone, Dorothy J.
Mitchell, Ernestine B.
Nugent, Elmer
Ollison, Elaine
Parish, Verna E.
Pilcher, Donald F.
Ramsey, Elaine
Rogers, A.J.
Rowland, Harold G.
Stewart, Buddy F.
Thomason, Franklin D.
Turner, Floyd E.
Turner, Rachel A.
Wallace, Kathryn A.
Wedsted, Vance
Westphall, Charles W.
White, Pearl
Wilson, Pat
Womack, Dorothy G.
Zeigler, George
Zgleszewski, Henry

I shall further recommend that Respondent make whole the above-listed employee applicants for any loss of earnings and benefits in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), and *New Horizons for the Retarded*, 283 NLRB 1173 (1987). I shall further order Respondent to give all unit employees written notice that it will recognize and bargain with the Union as the exclusive representative of employees in the unit. I shall also order Respondent to remove from its records all references to its refusal to employ the applicants listed above and notify each of them in writing that this has been done and the fact of their original nonhire will not be used against them in the future.

I shall order Respondent to recognize and, on request, bargain with the Union as the exclusive representative of all its employees in the unit. I shall also order Respondent to rescind, on the Union's request, the unilateral changes in unit employees' wages, hours, and terms and conditions of employment implemented in October 1988 and subsequently, inclusive of health and life insurance benefits, pension plan benefits, job classifications, and subcontracted bargained unit employees whole for losses they incurred, including George W. Deimel's pension plan benefits, by virtue of its unilateral changes to their wages, fringe benefits, and other terms and conditions of employment in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), with interest as prescribed in *New Horizons for the Retarded*, supra. Respondent shall remit all payments it owes to the employee benefit funds and reimburse its employees in the manner set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981), for any expenses resulting from Respondent's failure to make these payments. Any amounts that Respondent must pay into the benefit funds shall be determined in the manner set forth in *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1970).

In view of the widespread and egregious nature of Respondent's conduct, I shall also include a broad cease-and-desist order. See *Hickmont Foods*, 242 NLRB 1357 (1979).

On the above findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The Respondent, Pace Industries,d/b/a Precision Industries, Inc., Pace Industries, Inc., Pace Industries, Inc., d/b/a General Precision Tool & Die, Inc., Pace Industries, Inc., d/b/a Automatic Castings,Inc., a single employer, Malvern, Arkansas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to hire the former Universal Die Casting, Inc. employees of its Malvern, Arkansas plant, listed in subsection 2 below, in order to avoid recognition of and bargaining with their exclusive-collective bargaining representative.

(b) Refusing to recognize and bargain in good faith with the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) as the exclusive representative of the employees in the unit set forth below in subsection 2 below.

(c) Unilaterally setting and changing terms and conditions of bargaining unit employees without prior notification to or bargaining with their exclusive bargaining representative.

(d) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

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[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

2. Take the following affirmation action to effectuate the policies of the Act.

(a) Offer, in writing, to the extent that it has not already done so, immediate and full reinstatement to all employee applicants named below to the positions they held with the predecessor or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed while working for its predecessor, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them as described in the remedy section of this decision, discharging if necessary the persons hired into bargaining unit positions who had not previously worked in the Universal Die Casting, Inc. bargaining unit. With reinstatement offers, Respondent shall notify these individuals that it will recognize and bargain with the Union as their exclusive representative.

Baker, Charline W.
Ballentine, Ronnie T.
Berryhill, G. Tom
Berryhill, Marvin
Bowman, Gerald F.
Brooks, Willie
Burnett, Henry R.
Burroughs, Willene
Bryant, Tom H.
Clark, William
Cotton, Treva R.
Dial, Elsie Lee
Dial, Marvin
Diffee, Carrol C.
Dixson, Bill B.
Dyess, Rita
Eason, Doss A.
Fain, Kent
Jones, Laura
Jordan, Charles W.
Kelly, Velma M.
Lackey, Frances E.
Lackey, Smitty
Lowe, Allen
McCollum, Maude H.
McCollum, Stella P.
McDougal, Larry D.
McWhorter, Jackie L.
Malone, Dorothy J.
Mitchell, Ernestine B.
Nugent, Elmer
Ollison, Elaine
Parish, Verna E.
Pilcher, Donald F.
Ramsey, Elaine
Rogers, A.J.

Gray, Gerald E.
Gregory, Naydean C.
Hardy, Joy G.
Henderson, Jimmie A.
Hill, G. Dexter
Hill, Maude
Hilligoss, Dick O.
Honold, Brenda J.
Hood, Theresa
Jackson, Henry A.
Jackson, Jimmie F.
Jackson, Michael D.
Rowland, Harold G.
Stewart, Buddy F.
Thomason, Franklin D.
Turner, Floyd E.
Turner, Rachel A.
Wallace, Kathryn A.
Wedsted, Vance
Westphall, Charles W.
White, Pearl
Wilson, Pat
Womack, Dorothy G.
Zeigler, George
Zgleszewski, Henry

(b) Remove from its files any reference to the unlawful refusal to hire the above-named unit employees, and notify these employees in writing that this has been done and that this unlawful conduct will not be used against them in any way.

(c) On request, bargaining with the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All production and maintenance employees, including leaders and truck drivers employed at Respondent's Malvern, Arkansas plant, but excluding direct representatives of management, such as executives and superintendents,office and clerical employees, engineers, time-study men, draftsmen, laboratory employees, cafeteria help, professional employees, timekeepers, guards, First Aid employees, foremen and other supervisory employees as defined in the Act.

(d) On request of the Union, rescind the unilateral changes in the unit employees' wages, hours, and working conditions

implemented in the hiring of unit employees in October 1988 and thereafter, including health and life insurance benefits, pension plan benefits, job classifications, and subcontracted united work, and make whole affected employees, including those who employment is directed above, and with respect to pension plan benefits of George W. Deimel, for any and all losses they incurred by virtue of the unilateral changes to their wages, fringe benefits, and other terms and conditions of employment from the initial hire of unit employees in October 1988 and thereafter, until it negotiates in good faith with the Union to agreement or to impasse, in the manner set forth in the remedy section of this decision.

(e) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records and other records and documents necessary to analyze the amount of backpay and other moneys due under the terms of this Order and to ensure that this Order has been fully complied with.

(f) Post at its Malvern, Arkansas facility copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 26, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced,or covered by any other material.

---

[6] If this Order is enforced by a judgement of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgement of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated, Washington, D.C. May 4, 1993

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has determined that we have violated the National Labor Relations Act and has ordered us to post this Notice and to abide by its terms.

Federal Labor Law embodied in Section 7 of the National Labor Relations Act gives employees and employee applicants the following rights

To organize.

To form, join, or assist any union.

To bargain collectively through representatives of their own choosing.

To act together for other mutual aid or protection.

To choose not to engage in any of these protected concerted activities.

The National Labor Relations Act holds that an employer who employs a majority of employees from a bargaining unit employed by the former employer, whose operations the new employer takes over, must recognize and bargain with the labor organization that represented the predecessor's unit employees.

The Act further holds that an employer may not refuse to hire a predecessor's employees because it wishes to avoid recognizing and bargaining with a labor organization.

When Pace Industries, Inc., d/b/a Precision Industries, Inc., acquired the assets and business operation of Universal Die Casting, Inc., in Malvern, Arkansas, in October 1988, it unlawfully refused to hire the vast preponderance of its collective-bargaining unit employees in the unit named below. Accordingly, Pace Industries, Inc., d/b/a Precision Industries, Inc. was obligated to recognize and bargain with the International Union, United Automobile, Aerospace and Agriculture Implement Workers of America (UAW) as the exclusive representative of bargaining unit employees.

Given these facts, we give you the following assurances:

WE WILL NOT fail and refuse to hire employees of the predecessor employer, Universal Die Casting, Inc., at Malvern, Arkansas, in order to avoid becoming obligated to recognize and bargain with the Union as representative of bargaining unit employees.

WE WILL NOT refuse to recognize and bargain in good faith with the Union as the exclusive representative of the employees in the bargaining unit set forth below.

WE WILL NOT unilaterally set terms and conditions of employment for bargaining unit employees and, thereafter, unilaterally change those terms and conditions of employment without notifying the Union or providing it an opportunity to bargain respecting proposed changes.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees and/or employee applicants in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL offer, in writing, to the extent that we have not already done so, immediate and full reinstatement to all employ-

ees named below to the positions they held with the predecessor or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed while working for our predecessor, and WE WILL make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them as described in the remedy section of this decision, discharging if necessary the persons hired into bargaining unit positions who had not previously worked in the Universal Die Casting, Inc., Malvern, Arkansas bargaining unit. WE WILL notify these individuals that we will recognize and bargain with the Union as their exclusive representative.

Baker, Charline W.
Ballentine, Ronnie T.
Berryhill, G. Tom
Berryhill, Marvin
Bowman, Gerald F.
Brooks, Willie
Burnett, Henry R.
Burroughs, Willene
Bryant, Tom H.
Clark, William
Cotton, Treva R.
Dial, Elsie Lee
Dial, Marvin
Diffee, Carrol C.
Dixson, Bill B.
Dyess, Rita
Eason, Doss A.
Fain, Kent
Gray, Gerald E.
Gregory, Naydean C.
Hardy, Joy G.
Henderson, Jimmie A.
Jones, Laura
Jordan, Charles W.
Kelly, Velma M.
Lackey, Frances E.
Lackey, Smitty
Lowe, Allen
McCollum, Maude H.
McCollum, Stella P.
McDougal, Larry D.
McWhorter, Jackie L.
Malone, Dorothy J.
Mitchell, Ernestine B.
Nugent, Elmer
Ollison, Elaine
Parish, Verna E.
Pilcher, Donald F.
Ramsey, Elaine
Rogers, A.J.
Rowland, Harold G.
Stewart, Buddy F.
Thomason, Franklin D.
Turner, Floyd E.

Hill, G. Dexter
Hill, Maude
Hilligoss, Dick O.
Honold, Brenda J.
Hood, Theresa
Jackson, Henry A.
Jackson, Jimmie F.
Jackson, Michael D.
Turner, Rachel A.
Wallace, Kathryn A.
Wedsted, Vance
Westphall, Charles W.
White, Pearl
Wilson, Pat
Womack, Dorothy G.
Zeigler, George
Zgleszewski, Henry

WE WILL remove from our files any reference to the unlawful refusal to hire the above-named unit employees, and WE WILL notify these employees in writing that this has been done and that this unlawful conduct will not be used against them in any way.

WE WILL, on request, bargain with the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement. The appropriate bargaining unit is:

> All production and maintenance employees, including leaders and truck drivers employed at Respondent's Malvern, Arkansas plant, but excluding direct representatives of management, such as executives and superintendents, office and clerical employees, engineers, time-study men, draftsmen, laboratory employees, cafeteria help, professional employees, timekeepers, guards, First Aid employees, foremen and other supervisory employees as defined in the Act.

WE WILL, on request of the Union, rescind the unilateral changes in the unit employees' wages, hours, and working conditions that we implemented in the hiring of unit employees

in October 1988 and thereafter, including health and life insurance benefits, pension plan benefits, job classifications, and subcontracted unit work, and make whole affected employees, including those who are employed as directed above, and with respect to pension plan benefits of George W. Deimel, for any and all losses they incurred by virtue of the unilateral changes to their wages, fringe benefits, and other terms and conditions of employment from the initial hire of unit employees in October 1988 and thereafter, until we negotiate in good faith with the Union to agreement or to impasse, in the manner set forth in the remedy section of this decision.

WE WILL preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records and other records and documents necessary to analyze the amount of backpay and other moneys due under the terms of this Order and to ensure that this Order has been fully complied with.

PACE INDUSTRIES, INC., D/B/A PRECISION INDUSTRIES, INC., PACE INDUSTRIES, INC., PACE INDUSTRIES, INC., D/B/A GENERAL PRECISION TOOL & DIE, INC., PACE INDUSTRIES, INC., D/B/A AUTOMATIC CASTINGS, INC., A SINGLE EMPLOYER

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 96-1643

Pace Industries, Inc., et al.,
Petitioners,

v.

National Labor Relations Board,
Respondent.

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

September 8, 1997

Order Entered at the Direction of the Court:
/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX D

29 U.S.C. §158. Unfair labor practices

(a) Unfair labor practices by employer. It shall be an unfair labor practice for an employer --

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [29 USCS §157];

***

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by an action defined in section 8(a) of this Act [this subsection] as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employee as provided in section 9(a) [29 USCS §159(a)], in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) [29 USCS §159(e)] within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing

that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

***

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) [29 USCS §159(a)].

29 U.S.C. §159. Representatives and elections

(a) Exclusive representatives; employees' adjustment of grievances directly with employer. Representatives designed or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.

***

(c) Hearings on questions affecting commerce; rules and regulations.

(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board --

***

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a) [subsec. (a) of this section];

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted

by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

(2)
FILED
FEB 9 1998
OFFICE OF THE CLERK

No. 97-952

In the Supreme Court of the United States

OCTOBER TERM, 1997

PACE INDUSTRIES, INC., D/B/A
PRECISION INDUSTRIES, INC., ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Department of Justice
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Washington, D.C. 20570

35 pp

QUESTION PRESENTED

The National Labor Relations Board found that petitioner, a successor employer, unlawfully engaged in discriminatory hiring practices to avoid incurring a legal obligation to recognize and bargain with the union that represented its predecessor's employees. The question presented is whether the Board acted within its remedial authority in ordering petitioner to recognize and bargain with the union.

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In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-952

PACE INDUSTRIES, INC., D/B/A
PRECISION INDUSTRIES, INC., ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A17) is reported at 118 F.3d 585. The decision and order of the National Labor Relations Board (Pet. App. A18-A28), and the decision of the administrative law judge (Pet. App. A28-A206), are reported at 320 N.L.R.B. 661.

JURISDICTION

The judgment of the court of appeals was entered on July 1, 1997. A petition for rehearing was denied on September 8, 1997. Pet. App. A207. The petition for a writ of certiorari was filed on December 8, 1997

(a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. It is settled law that, where there is "substantial continuity" between the business enterprises of a previous employer and a new employer, the new employer is a "successor" to the old employer. A successor employer is obligated by Section 8(a)(5) of the National Labor Relations Act (Act), 29 U.S.C. 158(a)(5), to recognize and bargain with the union that represented its predecessor's employees, if a majority of the successor's workforce formerly was employed by its predecessor.[1]

Although a successor employer is not legally obligated to hire its predecessor's employees, refusing to hire those former employees for the purpose of avoiding the obligation to recognize and bargain with the union violates Section 8(a)(3) of the Act, 29 U.S.C. 158(a)(3).[2] A successor employer that engages in such unlawful hiring discrimination against the predecessor's employees also violates Section 8(a)(5) if it refuses to recognize and bargain with the union that represented the predecessor's employees.[3]

The remedies for such violations are well established. The "appropriate remedy" for failure to bar-

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[1] See *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27, 41, 43 (1987); *NLRB* v. *Burns Int'l Security Servs., Inc.*, 406 U.S. 272, 280-281 & n.4. (1972).

[2] *Fall River*, 482 U.S. at 40; *Burns*, 272 U.S. at 280-281 & n.5. See also *Howard Johnson Co.* v. *Detroit Local Jt. Exec. Bd.*, 417 U.S. 249, 261-262 & n.8 (1974).

[3] See, *e.g.*, *NLRB* v. *Horizons Hotel Corp.*, 49 F.3d 795, 806 (1st Cir. 1995); *Elastic Stop Nut Div. of Harvard Indus.* v. *NLRB*, 921 F.2d 1275, 1282 (D.C. Cir. 1990).

gain generally consists of "restoration of the previously existing employment terms, the *status quo ante*," and enforcement of the "obligation to bargain" before new changes can be made.[4] Similarly, where a successor has engaged in unlawful hiring discrimination to avoid its bargaining obligation, the Board acts within its remedial authority in ordering the successor to recognize and bargain with the union, and to rescind unilateral changes in employment terms pending good-faith negotiations with the union or an impasse in bargaining.[5]

2. Petitioner Pace Industries, Inc., d/b/a Precision Industries, Inc., manufactures aluminum die castings. Pet. App. A2, A44.[6] In October 1988, petitioner purchased from Universal Die Casting, Inc. (UDC) two plants in Arkansas, one in Little Rock and the other in Malvern. *Id.* at A2, A38, A46. At the time of the purchase, the International Union, United Automo-

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[4] *U.S. Marine Corp.* v. *NLRB*, 944 F.2d 1305, 1322 (7th Cir. 1991) (en banc), cert. denied, 503 U.S. 936 (1992). See also *New Breed Leasing Corp.* v. *NLRB*, 111 F.3d 1460, 1467-1469 (9th Cir.), cert. denied, 118 S. Ct. 366 (1997).

[5] See, *e.g.*, *New Breed Leasing Corp.*, 317 N.L.R.B. 1011, 1011 & n.3, 1027 (1995), enforced, 111 F.3d 1460 (9th Cir.), cert. denied, 118 S. Ct. 366 (1997); *U.S. Marine Corp.*, 293 N.L.R.B. 669, 672, 673 (1989), enforced, 944 F.2d 1305 (7th Cir. 1991) (en banc), cert. denied, 503 U.S. 936 (1992).

[6] In addition to Pace Industries, Inc., d/b/a Precision Industries, Inc., two other entities are named as petitioners: Pace Industries, Inc., d/b/a General Precision Tool & Die, Inc., and Pace Industries, Inc., d/b/a Automatic Castings, Inc. See Pet. 1. Because these three entities constitute a single employer for purposes of the National Labor Relations Act (Pet. App. A194), and because the nominal distinctions among them ~~is~~ are of no material significance here, we refer to the three entities, collectively, as "petitioner."

bile, Aerospace and Agricultural Implement Workers of America (Union) represented a bargaining unit consisting of all production and maintenance employees at UDC's Malvern plant. *Id.* at A2, A38, A194. UDC and the Union previously had negotiated a three-year collective-bargaining agreement, effective through May 6, 1989. *Id.* at A39. The employees at UDC's Little Rock plant, however, were not represented by a union. *Id.* at A2.

On October 14, 1988, UDC ceased operations at the Malvern plant and discharged the employees. Pet. App. A3, A47. Petitioner, as the new owner of the plant, then solicited job applications from the general public, requiring UDC's former Malvern employees to submit applications if they wished to continue their employment at the plant. *Id.* at A3, A160. To restaff the Malvern plant, petitioner, at a cost of about $100,000, implemented an elaborate hiring procedure, interrupting production and jeopardizing commitments to customers. *Id.* at A3. The hiring process, which took six to eight weeks to complete, required applicants to submit to various aptitude tests, skills tests, and a physical examination, including a back x-ray. *Id.* at A3-A5, A161, A163, A165-A168, A173. Although 103 of UDC's former Malvern employees submitted applications, petitioner hired only 22 of them, a numerical minority of its workforce at the Malvern plant. *Id.* at A6, A24, A47, A163.

By contrast, the non-union Little Rock plant did not close for restaffing; instead, petitioner vested the plant manager with complete discretion in deciding whom to hire. With virtually no review of their applications, and without requiring any testing or physical examination, the plant manager hired almost all of UDC's former Little Rock employees, based on

his personal knowledge of the applicants. Pet. App. A3, A5, A161. On and after October 14, petitioner unilaterally altered the employment terms of the employees in the Malvern bargaining unit without prior notice to or bargaining with the Union. *Id.* at A193, A195.

3. On May 25, 1989, acting on charges filed by the Union, the General Counsel of the National Labor Relations Board (Board) issued a complaint against petitioner. Pet. App. A29. As later amended, the complaint alleged that, in violation of Section 8(a)(1), (3), and (5) of the Act, 29 U.S.C. 158(a)(1), (3), and (5), petitioner had discriminatorily refused to hire former UDC employees at the Malvern plant because they were represented by the Union, had refused to recognize and bargain with the Union as the representative of the employees in the Malvern bargaining unit, and had unilaterally altered the Malvern employees' terms and conditions of employment without bargaining with the Union. Pet. App. A29-A30, A32.

The litigation that followed was protracted. Although a hearing was originally scheduled for November 13, 1989 (Pet. App. A31), the parties were unable to agree on the terms of a protective order, and the hearing was adjourned to permit the General Counsel to pursue a subpoena enforcement action against petitioner in federal district court. *Ibid.* After the entry of a consent decree by the district court and the General Counsel's review of the subpoenaed material, the General Counsel filed an amended complaint on June 22, 1990. *Id.* at A32. From September 17, 1990, to November 19, 1991, the administrative law judge (ALJ) took 15 solid weeks of testimony, producing a transcript of 13,000 pages. *Id.* at A33. After review of what concededly had become a "monumental" record

(*id.* at A36), the parties submitted briefs to the ALJ on October 5, 1992.

a. On May 4, 1993, the ALJ issued a decision, finding that petitioner had violated the Act, as alleged. Pet. App. A29-A206. The ALJ concluded that petitioner was a successor employer to UDC, in that there was "substantial continuity" between petitioner's operations and those of UDC at the Malvern plant. *Id.* at A190. Accordingly, petitioner was under a duty not to avoid its obligation to bargain with the union by discriminating against former employees. Yet the ALJ found that petitioner had done precisely that: "[T]he purpose of the Malvern screening procedure," the ALJ found, "was to get rid of the Union," and "the proffered business reasons for the Malvern screening process were totally false and pretextual." *Id.* at 179; see also *id.* at A182-A183. Although petitioner had attempted to mask its purpose with an elaborate screening procedure, the net effect was that petitioner had "refused to hire * * * 62 former Malvern UDC employees because they had been represented by the Union, and [because] their hiring by [petitioner] was feared to have necessitated recognition and bargaining with the Union." *Id.* at A186.[7]

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[7] The anti-union motivation was evident not merely from the fact that screening procedures were imposed at the union plant in Malvern but not the non-union plant in Little Rock, but also from the manner in which the screening process operated. Former workers at the Malvern plant were rejected for omissions in their applications even though new hires had similar omissions in their applications (Pet. App. A12, A164-165), other reasons for rejecting former employees appeared pretextual (*id.* at A12-A13, A173, A174), and the entire process of testing was set up in a manner that "enabled [petitioner] to

The ALJ further found that, "had it not been for the fear that it might have had to recognize and bargain with the Union, * * * [petitioner] would have continued in place the entire complement of former UDC employees." Pet. App. A189. Addressing the possibility of new hires, the ALJ also concluded that "but for the discriminatory hiring procedure, the Union's presumption of majority status would have continued" among the employees in the Malvern bargaining unit. *Id.* at A191.

Based on these findings, the ALJ concluded that petitioner's refusal to recognize and bargain with the Union, and its unilateral changes to the terms of employment, violated Section 8(a)(1) and (5) of the Act. Pet. App. A192-A193, A195. The ALJ therefore recommended that petitioner reinstate the victims of discriminatory hiring with full backpay (*id.* at A195-A197), and that petitioner be required to recognize and bargain with the Union (*id.* at 197).

b. Petitioner filed 282 objections to the ALJ's findings and conclusions with the Board, and a 100-plus page brief in support of its objections. On January 3, 1996, the Board issued a decision affirming the ALJ's findings and conclusions, with certain modifications that are not relevant here. Pet. App. A18-A28. The Board agreed with the ALJ that, in implementing the hiring procedure at the Malvern plant, "[petitioner's] purpose * * * [was] simply to make sure that former UDC employees did not make up a majority of its work force, and thereby to avoid incurring the duty to recognize and bargain with the Union." *Id.* at A24. The Board adopted the ALJ's

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arbitrarily control the ratio of UDC and non-UDC applicants hired" (*id.* at A174-A175).

recommended remedial order (*id.* at A19, A27), which requires petitioner to offer reinstatement to specified victims of discrimination; to give them back pay and other make-whole relief; to bargain with the Union as the representative of the employees in the bargaining unit at the Malvern plant; and to rescind the unilateral changes in the terms of employment for the Malvern bargaining unit "until [petitioner] negotiates in good faith with the Union to agreement or to impasse." *Id.* at A199-A201.

4. Petitioner sought judicial review of the Board's order, and the Board cross-petitioned for enforcement. The court of appeals denied the petition for review, and granted the petition for enforcement. Pet. App. A1-A17.

The court concluded that substantial evidence supports the Board's finding that petitioner instituted the hiring procedure at the Malvern plant in order to avoid an obligation to recognize and bargain with the Union. Pet. App. A9, A10-A15. Rejecting petitioner's contention that the remedy fashioned by the Board "exceeds its authority," the court explained that "[t]he goal of a remedial order is to restore 'the situation, as nearly as possible, to that which would have obtained but for the [unfair labor practices].'" *Id.* at A15-A16 (quoting *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 194 (1941); bracketed material added by court of appeals). "Ordering [petitioner] to offer reinstatement and backpay to the discriminatees is directly aimed at and fulfills that purpose," the court concluded. *Ibid.*

The court similarly concluded that the remedy of "[r]escinding the unilateral changes in employment conditions likewise comports with the policies of the Act." Pet. App. A16. "In fashioning the order," the

court observed, "the ALJ correctly presumed that without the discriminatory hiring practices the union's majority status would have continued, which in turn would have required that [petitioner] bargain with the union before making changes in employment terms." *Id.* at A16-A17.

ARGUMENT

Before this Court, petitioner does not challenge the Board's findings that petitioner engaged in unfair labor practices. Nor does petitioner question the Board's general remedial authority to require a successor employer, like petitioner, to bargain with the union where, as here, the employer engaged in hiring discrimination in an unlawful attempt to avoid a legal duty to bargain. Rather, petitioner's sole contention (Pet. 5-6) is that the court of appeals should not have enforced the Board's bargaining order in this case because of "changed circumstances" occurring between the closure of the Malvern plant in October 1988 and the court of appeals' issuance of its decision in July 1997. That fact-bound claim was not properly preserved, is without merit, and does not implicate a division in circuit authority. Accordingly, further review is not warranted.

1. As an initial matter, petitioner's claim of "changed circumstances" is jurisdictionally barred by Section 10(e) of the Act, 29 U.S.C. 160(e). Section 10(e) provides that "[n]o objection that has not been urged before the Board * * * shall be considered by the [reviewing] court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." 29 U.S.C. 160(e). Petitioner did not object to the issuance of a bargaining order on the basis of "changed circumstances" before

the Board at any time prior to the Board's issuance of its January 1996 decision. Nor did petitioner raise such an objection by filing a motion for reconsideration with the Board at any time thereafter. See Pet. App. A18, A27, A200; 29 C.F.R. 102.48(d)(1). Instead, petitioner raised that objection for the first time in the court of appeals (which declined to address it). Pet. App. A15-A17; see also Pet. 3-4. Because petitioner failed to raise its changed circumstances contention before the Board (by motion for reconsideration or otherwise), Section 10(e) precludes this Court—as it precluded the court below—from addressing the argument now. See *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 665-666 (1982); *International Ladies' Garment Workers' Union* v. *Quality Mfg. Co.*, 420 U.S. 276, 281 n.3 (1975).[8]

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[8] Petitioner errs in suggesting (Pet. 4 n.2) that Section 10(e)'s jurisdictional bar is inapplicable here because Section 10(e) "is not a limitation on the equity powers of the courts of appeals in determining the appropriateness of a particular remedy." Nothing in the text of Section 10(e) creates an exception for remedial objections. To the contrary, Section 10(e) jurisdictionally bars judicial consideration of any "objection that has not been urged before the Board," language that by its plain terms includes "objections" to the remedy selected. Indeed, this Court has so construed Section 10(e). See *NLRB* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 350 (1953) (objection to remedy barred by Section 10(e) where objection was not raised before the Board); *Marshall Field & Co.* v. *NLRB*, 318 U.S. 253, 255-256 (1943). Petitioner also suggests (Pet. 4 n.2) that Section 10(e) is inapplicable to this case because, "by definition, 'changed circumstances' occur subsequent to the Board's action and * * * could not have been presented before the Board." But petitioner effectively concedes that the changed circumstances at issue here arose before the Board issued its decision, since petitioner argues (Pet. 5, 6) that the increase in the size of the Malvern workforce was "largely attributable" to Board

Besides, even if petitioner's "changed circumstances" argument were not jurisdictionally barred, review by this Court would still be unwarranted. Petitioner's "changed circumstances" claim is fact-bound, see *Massachusetts* v. *Sheppard*, 468 U.S. 981, 988 n.5 (1984), and was addressed by neither the Board nor the court below. See Pet. 3 ("the Court of Appeals failed to address whether the NLRB's bargaining order should be enforced in light of the changed circumstances"). This Court ordinarily does not, and should not, consider a question that was not decided by the court below. See *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 697 (1984) ("[W]e do not ordinarily consider questions not specifically passed upon by the lower court."); cf. *Kungys* v. *United States*, 485 U.S 759, 773 n.6 (1988) (plurality opinion) ("it is not our normal practice to consider fact-bound legal consequences of contested district court findings not yet

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delay. See also Pet. 3 (complaining that "[t]he final Board decision was issued * * * nearly seven years after the charge was filed"). Besides, even if the alleged "changed circumstances" arose after the Board issued its decision, they would be of doubtful relevance with respect to the propriety of the Board's bargaining order, and should have been brought before the Board on reconsideration in any event, since the Act vests remedial discretion in the Board rather than the courts. See *NLRB* v. *So-Lo Foods, Inc.*, 985 F.2d 123, 129 (4th Cir. 1992) (court of appeals "will not generally consider evidence of events subsequent to the Board's decision during our review of that decision"); see also *Peoples Gas System, Inc.* v. *NLRB*, 629 F.2d 35, 48 (D.C. Cir. 1980) (in determining whether to issue a bargaining order pursuant to *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969), "the Board should formulate its remedy in light of * * * the conditions in the bargaining unit at the time it renders its decision").

reviewed by the court of appeals"); *Yee* v. *City of Escondido*, 503 U.S. 519, 533 (1992).

2. Petitioner's "changed circumstances" argument is not only procedurally barred but substantively meritless as well.

a. In essence, petitioner argues that requiring it to bargain with the union was inappropriate because the composition of the workforce changed substantially after the Malvern plant closed. According to petitioner, the plant had only 35 employees when it closed in October 1988, and has more than 300 employees today. Pet. 5, 8. Both factual premises for petitioner's changed circumstances argument are unsupported by the record.

With respect to petitioner's argument that there were "35 'active' employees" in October 1988, the ALJ correctly rejected that contention as "meaningless." Pet. App. A191. "84 former employee applicants * * * were stipulated to have been employed by UDC on October 14, 1988," *ibid.*, and as many as 103 former Malvern employees applied for jobs with petitioner at the Malvern plant, *id.* at A6.[9]

Petitioner's assertion that the "Malvern plant employed about 300 workers" at the time of the Eighth Circuit's decision (Pet. 5, 8) is similarly unsupported. The record is wholly silent as to the number of employees working at the plant at that time. Hence,

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[9] Petitioner nowhere explains why the number of "active" workers at the moment of closure—a figure that excludes any worker who was laid off or furloughed even the day before closure—is the most appropriate starting point. Petitioner's unlawful discrimination against former employees was not limited to those workers who were "active" on the last day of operations, but rather extended to all former employees, including those who had previously been laid off.

the factual premises for petitioner's changed circumstances argument are not supported by the record.

b. Even if one were to assume that petitioner employed 300 workers at the Malvern plant at the time of the court of appeals' decision in July 1997—and there is no basis for any such assumption—that purported fact, standing alone, would not require that enforcement of the Board's bargaining order be declined. To the contrary, as the ALJ and the court of appeals noted, but for the discriminatory hiring procedure implemented by petitioner at the Malvern plant in October 1988, the Union would have enjoyed a continued presumption of majority status in the Malvern bargaining unit when the plant reopened. See Pet. App. A16, A191; see also *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27, 37-39 (1987) (noting that unions are entitled to a "rebuttable presumption of majority support" even where there is a change in employers). That presumption of majority status would have continued notwithstanding increases in the size of the workforce, since new hires are as likely to support the union as old ones. See *Pioneer Inn Assocs.*, 228 N.L.R.B. 1263, 1266 (1977) (noting the rebuttable presumption that "new employees will support the union in the same proportion as those employees with more seniority"), enforced, 578 F.2d 835 (9th Cir. 1978). Thus, the allegedly changed circumstances on which petitioner seeks to rely were themselves a result of petitioner's unlawful discriminatory hiring procedures.[10]

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[10] Petitioner also complains (see, *e.g.*, Pet. 6) that delays by the Board in resolving this case contributed to the changed circumstances. Much of that delay, however, was caused by petitioner's own litigation tactics. Substantial delays were im-

Accordingly, petitioner's representation as to the size of the Malvern workforce in July 1997 does not constitute a "changed circumstance" that would have rendered a bargaining order inappropriate here.

3. Finally, there is no merit to petitioner's suggestion (Pet. 7-8) that the decision of the court of appeals, by enforcing the Board's bargaining order despite allegedly "changed circumstances," conflicts with the decisions of other circuits.

As petitioner acknowledges (Pet. 3-4), the court of appeals did not address whether "changed circumstances" might render the bargaining order inappro-

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posed from the outset when petitioner and the General Counsel were unable to negotiate an acceptable confidentiality agreement. As a result of that impasse, the hearing originally scheduled for November 13, 1989, was adjourned so the General Counsel could pursue a subpoena enforcement action against petitioner in federal district court. Pet. App. A31. After the entry of a consent decree by the district court and review of the subpoenaed materials, the General Counsel filed an amended complaint on June 22, 1990. *Id.* at A32. Then, from September 17, 1990, to November 1991, the ALJ took testimony in "[f]ifteen weekly sessions of often intensive, concentrated litigation," which were spread out as an "accommodation with the schedules of all parties." *Id.* at A33. Because the resulting record was "monumental"—the transcript alone spanned 13,000 pages—and because of "the complexity of the factual issues," the parties were granted until October 5, 1992 to file their post-hearing briefs before the ALJ. *Id.* at A36. After reviewing those submissions (including petitioner's 1,000-plus page brief) the ALJ issued his decision on April 4, 1993. *Id.* at A36, A202. On August 5, 1993, petitioner filed 282 exceptions to the ALJ's decision with the Board, and a 140-page brief in support thereof; it filed a reply brief on October 8, 1993. After reviewing the enormous record and the voluminous submissions of the parties, the Board issued its decision about two years and three months later, on January 3, 1996. *Id.* at A18.

priate. See Pet. App. A15-A17. It is thus difficult to see how the court's decision can be inconsistent with the "changed circumstances" decisions of any other circuit. Nor is it at all clear how this case could present an appropriate vehicle for resolving the asserted conflict, especially given the existence of the jurisdictional bar. See pp. 9-11 & n.8; see also *Capital Cities Cable, Inc.*, 467 U.S. at 697 (Court ordinarily will not review issues not expressly adjudicated by the lower court).

Besides, even if the court of appeals had passed on the changed circumstances argument (despite the jurisdictional bar), there still would be no conflict: The cases upon which petitioner relies (Pet. 7) are simply inapposite. For example, in *NLRB* v. *Thill, Inc.*, 980 F.2d 1137 (7th Cir. 1992), the court declined to enforce the Board's bargaining order where, "as a result of [the Board's] own delay in deciding the company's appeal," seven years had elapsed between the ALJ's decision and that of the Board. *Id.* at 1142. Here, by contrast, less than two and one-half years elapsed between the ALJ's and the Board's respective decisions (see Pet. App. A18), and that time elapsed not because of the Board's inattentiveness but rather because of the need to review a concededly "monumental" record and the monumental number of exceptions —282 in all—that petitioner placed before the Board. See Pet. App. A36; pp. 7-8, 13 n.10, *supra*. The other cases cited by petitioner (Pet. 7) similarly involved both a significantly greater passage of time than occurred here and additional factors—including

manifest employee desire to *avoid* union representation—not present in this case.[11]

Similarly inapposite are the cases petitioner cites (Pet. 8) as having declined to enforce the Board's bargaining orders based on employee turnover in the bargaining unit. Those cases address so-called *Gissel* orders (see *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969)).[12] *Gissel* orders require an employer to recognize and bargain with the union even though the union and the employer have not previously established a relationship recognizing the union as the employees' bargaining representative. Such orders are typically entered after the union loses an election,

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[11] See *NLRB* v. *LaVerdiere's Enters.*, 933 F.2d 1045, 1053-1056 (1st Cir. 1991) (Pet. 7) (declining to enforce bargaining order where employees were engaged in an "effort to bring about a decertification vote," the employer's unfair labor practices were "insubstantial," and there was an "inordinate delay" of three and one-half years "while the ALJ's decision was on appeal to the Board"); *Texas Petrochemicals Corp.* v. *NLRB*, 923 F.2d 398, 403-406 (5th Cir. 1991) (Pet. 7) (staying enforcement of bargaining order and remanding case to Board for a decertification election based on "unreasonable" four year delay between ALJ's and Board's decisions and an employee petition indicating that "a majority of the employees * * * were opposed to union representation"). See also *Lee Lumber & Bldg. Material Corp.* v. *NLRB*, 117 F.3d 1454, 1462 (D.C. Cir. 1997) (Pet. 7) (remanding case to the Board for an explanation of "why an affirmative bargaining order is necessary given the facts of this case," where "[t]his entire incident arose seven years ago, the unfair labor practices in question were relatively slight, and the employees twice indicated that they were unhappy with the Union").

[12] See *Be-Lo Stores* v. *NLRB*, 126 F.3d 268, 274-275, 282-283 (4th Cir. 1997); *NLRB* v. *Marion Rohr Corp.*, 714 F.2d 228, 230-231 (2d Cir. 1983); *Red Oaks Nursing Home, Inc.* v. *NLRB*, 633 F.2d 503, 507, 510 (7th Cir. 1980).

but the election is invalidated as tainted by the employer's unfair labor practices. If the Board concludes that a new election—because of the lasting effects of the unfair labor practices—cannot be fairly held, the Board may decline to hold a new election. Rather, based on other evidence that a majority of the employees desire union representation, the Board may, under *Gissel*, impose a bargaining order instead: "If the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue." 395 U.S. at 614-615.

Thus, the concern that earlier unfair labor practices may taint a new election and render it unfair will ordinarily justify the imposition of a bargaining order instead. In the context of such *Gissel* bargaining orders, some courts have held that the intervening departure of many of the employees who were subjected to the unfair labor practices is a relevant consideration in determining whether it is possible to hold a fair election, which would obviate the need to rely on less certain means, such as authorization cards, of ascertaining the employees' desires. However, that reasoning cannot apply outside the *Gissel* context where, as here, the union was recognized by the predecessor employer as the bargaining representative of the employees and, absent the unfair labor practices, the union likewise would have been recognized by the successor as well. In such a case, there is no doubt that the employees had duly chosen to be represented by the union, as the result of an election held under the predecessor employer, or an

established bargaining relationship between the predecessor employer and the union, unmistakably attests. In such a situation, the problem of choosing between an election and some less reliable means of ascertaining the employees' desires is not present. The Board thus acts reasonably in reestablishing the state of affairs preceding the unfair labor practices by requiring the successor employer to recognize and bargain with the union, as the successor employer was legally obligated to do absent its unfair labor practices.

Finally, the employee turnover cases upon which petitioner relies are also inapposite because they involve employee turnover that resulted from ordinary attrition. Indeed, in *Be-Lo Stores* v. *NLRB*, 126 F.3d 268 (4th Cir. 1997)—the primary case upon which petitioner relies (Pet. 8)—the court specifically noted that employee turnover is a relevant consideration in *Gissel* cases to the extent it is attributable to "normal attrition." 126 F.3d at 282. That holding cannot properly be extended to cases, like this one, in which employee attrition resulted from the unfair labor practice itself. *NLRB* v. *Gordon*, 792 F.2d 29, 34 (2d Cir.) (employee turnover "not a factor that mitigates against a [*Gissel*] bargaining order" where "caused by the very unfair labor practices sought to be remedied"), cert. denied, 479 U.S. 931 (1986). Indeed, such an extension would reward the employer for misconduct. Having succeeded in driving union employees from the firm through unfair labor practices, the employer could oppose an NLRB bargaining order on the ground that—because few victims of the unfair labor practices remain—a fair election can be held. Surely the Board acts within its discretion when it refuses to reward the employer for its unfair prac-

tices with an election to which the employer is not otherwise entitled. As this Court has explained, a Board remedy "which deprives an employer of advantages accruing from a particular method of subverting the Act, is a permissible method of effectuating the statutory policy." *Virginia Elec. & Power Co.* v. *NLRB*, 319 U.S. 533, 541 (1943).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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